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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC., APPELLANT,

versus

SOUTH CAROLINA TAX COMMISSION, APPELLEE

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

FILED JANUARY 7, 1972
PROBABLE JURISDICTION NOTED FEBRUARY 28, 1972

RELEVANT DOCKET ENTRIES

1. January 2, 1969—Ruling by the South Carolina Tax Commission.
2. February 1, 1969—Heublein, Inc.'s payment under protest of the taxes assessed by the South Carolina Tax Commission.
3. February 20, 1969—Service by Heublein, Inc. of a Summons and Complaint upon the South Carolina Tax Commission.
4. April 30, 1969—Service by the South Carolina Tax Commission of their Answer upon Heublein, Inc.

5. July 28, 1970—Trial of the case before Judge John Grimball of the Court of Common Pleas.
6. February 18, 1971—Order signed by Judge Grimball of the Court of Common Pleas.
7. February 22, 1971—Notice of Intention to Appeal served by the South Carolina Tax Commission.
8. March 31, 1971—Transcript of Record filed with the South Carolina Supreme Court.
9. June 16, 1971—Oral argument before the South Carolina Supreme Court.
10. September 22, 1971—Opinion of the South Carolina Supreme Court filed.
11. October 1, 1971—Petition for Rehearing filed with the South Carolina Supreme Court.
12. October 11, 1971—Petition for Rehearing denied.
13. December 30, 1971—Notice of Appeal to the Supreme Court of the United States served.
14. January 7, 1972—Jurisdictional Statement (Heublein, Inc.) filed.
15. January 26, 1972—Brief of The Distilled Spirit Institute as *Amicus Curiae* filed.
16. February 1, 1972—Motion to Dismiss (South Carolina Tax Commission) filed.
17. February 28, 1972—Probable Jurisdiction noted.
18. February 29, 1972—Letter from the Supreme Court of the United States, Office of the Clerk, to the Solicitor General of the United States inviting him to file a Brief as *Amicus Curiae*.

BEFORE THE SOUTH CAROLINA TAX COMMISSION

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

In Re: Heublein, Inc., a finding of whether the South Carolina income of the corporation is excluded from taxation by Public Law 86-272, now codified as 15 U. S. C. A. 381, *et seq.*

The corporation, a "registered producer" as defined by Article 7, Chapter 1, Title 4 of the Code of Laws of South Carolina, has a resident registered representative and has likewise registered the brands of its products that are sold in South Carolina. The corporation sells alcoholic beverages to licensed wholesalers and the taxation of the income from such business is the subject involved herein.

The Corporation Income Tax Division has assessed a tax on such income and the corporation appears before us today in protest of the assessment, contending that the income is not subject to taxation because of Public Law 86-272. That law sets up certain activities that the corporation may do and not be subject to taxation; however, Article 7, Chapter 1, Title 4, requires the corporation, in order to legally sell its products to the wholesalers, to engage in activities in South Carolina that exceed the minimum as provided for by Public Law 86-272. The corporation, however, contends that the South Carolina statutes are regulatory and in no way affect the taxability of the income. The provisions of the Article were a part of the general laws of the State prior to the enactment by the Federal Congress of Public Law 86-272. The corporation does not dispute the fact that it complies in every way with the requirements of the Article and thus engages in a legal business that would otherwise be illegal or prohibited.

Under such circumstances, the corporation's activities in South Carolina exceed the minimum requirements of Public Law 86-272 and the income therefore is taxable.

SOUTH CAROLINA TAX COMMISSION,

Columbia, South Carolina, ROBERT C. WASSON,
As of January 2, 1969. Chairman.

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

HEUBLEIN, INC., PLAINTIFF,

versus

SOUTH CAROLINA TAX COMMISSION, DEFENDANT

COMPLAINT

The Plaintiff herein, complaining of the Defendant herein, alleges:

(1) That the Plaintiff, Heublein, Inc., is a corporation duly organized and existing under the laws of the State of Connecticut and is not qualified to do business in the State of South Carolina.

(2) That the Defendant, South Carolina Tax Commission, is a department of the government of the State of South Carolina.

(3) That the Plaintiff following a ruling by the Defendant, South Carolina Tax Commission, filed a State of South Carolina Corporation Tax Return for the years ending June 30, 1963 through 1968 inclusive and paid the corporation income taxes and license fees attributable thereto, with interest thereon, on or about February 1, 1969, in the following respective sums:

Year	*Amount with Interest*
1963	$2,757.79
1964	3,614.36
1965	3,958.31
1966	4,288.08
1967	4,727.28
1968	4,961.27

or a total sum of $24,307.09, all payments having been made under protest.

(4) That the Plaintiff's representative solicits orders for alcoholic beverages within the State of South Carolina, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or de-

livery from a point outside the State, and Plaintiff alleges that its activities within South Carolina in this regard do not exceed the minimum standards of Public Law 86-272 (Codified as 15 U. S. C. §§ 381-84) and that this Federal Statute bars South Carolina from imposing an income tax upon the Plaintiff.

(5) That in addition to the activities of the Plaintiff within South Carolina as are outlined in Paragraph (4) above, and as required by the regulatory provisions of the South Carolina liquor laws, South Carolina Code of Laws (1962) §§ 4-131-150, the Plaintiff has registered as a "registered producer," authorized to ship alcoholic beverages into the State and has designated its resident salesman in Columbia as a "producer representative" in whose care all shipments of Heublein's alcoholic beverages are consigned and the Plaintiff has not engaged in any activity in its compliance with these liquor laws other than the minimum required by them, but, nevertheless, the Defendant has ruled, wrongfully and illegally, that these actions and activities performed solely in compliance with the requirements of the State's liquor laws take the Plaintiff without the protection of Public Law 86-272, and subject it to the State's income tax.

(6) That under the correct interpretation of the facts and the law, the activities of the Plaintiff in compliance with the South Carolina liquor laws are but steps in the filling of orders "by shipment or delivery from a point outside of the State," and thus come within the express terms of Public Law 86-272; and if these activities in compliance with requirements of South Carolina liquor laws do exceed the minimum standards of Public Law 86-272, these activities still do not subject the Plaintiff to liability for income tax since such activities are performed under compulsion of the State; that the State may regulate the method and mechanics of the importation of alcoholic beverages under its police power, but its compliance with these regulatory provisions cannot subject the Plaintiff to another and different power now sought to be invoked by the State, to wit, this taxing power, which it is precluded from exercising because of the act of Congress, Public Law 86-272.

(7) That in addition to income tax, included in the payments heretofore referred to, there was an annual corporation license fee and since this license fee is predicated upon liability for income tax, the Defendant is precluded from assessing and collecting such license fee from the Plaintiff for the same reasons that it cannot assess and collect the income tax.

(8) That the Plaintiff, therefore, is informed and believes that the sums so assessed as income and license taxes for the years 1963 through 1968, inclusive, together with interest thereon, were illegally assessed and collected and that the Plaintiff is entitled to a refund of said payments in the amount of $24,307.09, together with interest, and that the Plaintiff is entitled to have this Court order that said refund be made.

(9) That the Plaintiff has exhausted its administrative remedies, the Defendant having on or about January 2, 1969, after hearing, handed down a formal ruling rejecting the position of the Plaintiff as is herein set forth and holding that the activities of the Plaintiff within this State in meeting the requirements of the regulatory provisions of South Carolina liquor laws constitute activities within this State which exceed the minimum requirements of Public Law 86-272.

WHEREFORE, the Plaintiff prays:

That this Court issue its order directing repayment to the Plaintiff of the sum of $24,307.09, together with interest thereon from date of payment, and for such other and further relief as may be just and proper.

ROBERTS, JENNINGS & THOMAS,
Attorneys for the Plaintiff.

707 Barringer Building,
Columbia, South Carolina,
February 19, 1969.

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

ANSWER

The defendant herein, answering the Complaint of the plaintiff, respectfully shows to the Court:

1. That all of the allegations not specifically admitted, amended or modified are denied.

2. That the allegations of paragraphs 2, 3 and 9 are admitted.

3. That the allegations of paragraph 1 are admitted except that part alleging that the plaintiff is not qualified to do business in South Carolina, which part is denied.

4. That the allegations of paragraph 4 are denied except that part alleging that plaintiff's representative solicits orders for alcoholic beverages within the State of South Carolina, which part is admitted.

5. That the allegations of paragraph 5 are denied except that part alleging that the plaintiff is required by Sections 4-131-150 of the 1962 Code of Laws to register as a "registered producer", which requirements the plaintiff has complied with and that part alleging that the plaintiff has designated its resident salesman in Columbia as a "producer representative" to which shipments of alcoholic beverages into the State of South Carolina are consigned, which parts are admitted, and it is furthermore admitted that the defendant has ruled that the activities of the plaintiff subject it to the jurisdiction of the State of South Carolina and the imposition of the South Carolina income tax.

6. That the allegations of paragraph 6 are denied except that part alleging that the State may regulate the method and mechanics of the importation of alcoholic beverages, which part is admitted.

7. That the allegations of paragraph 7 are denied except that it is admitted by the defendant that included in the payments made by the plaintiff to the defendant was an annual corporation license fee.

8. That the allegations of paragraph 8 are denied.

WHEREFORE, the defendant, having fully answered all of the allegations of the plaintiff's Complaint, respectfully prays that it be dismissed and this action ended.

DANIEL R. McLEOD,
Attorney General of South Carolina,
JOE L. ALLEN, JR.,
Assistant Attorney General of South Carolina,
G. LEWIS ARGOE, JR.,
Assistant Attorney General of South Carolina,
Attorneys for Defendant.

Columbia, South Carolina,
April 30, 1969.
(Verification omitted in printing.)

IN THE COURT OF COMMON PLEAS
(Caption Omitted in Printing)

STIPULATION OF FACTS

For the purpose of the trial in this case, the parties have agreed that the following facts will be stipulated.

Heublein, Inc., hereinafter "Heublein," is a Connecticut corporation and has never applied for or received a certificate of qualification from the Secretary of State to do business in South Carolina. The defendant, the South Carolina Tax Commission, hereinafter called "the Commission," is a department of the government of the State of South Carolina. At issue in this suit is the South Carolina income and license tax liability of Heublein. The Commission ruled on or about January 2, 1969, that Heublein was subject to South Carolina tax. A copy of this ruling is attached hereto as "Appendix A." [A., 3] Following this ruling, Heublein filed State of South Carolina corporation tax returns for the years ending June 30, 1964 through 1968, inclusive, and on February 1, 1969, paid under protest the corporation income taxes and license fees which the defendant insisted were due, including interest in the following respective sums:

Year	*Amount with Interest*
1964	$3,614.36
1965	3,958.31
1966	4,288.08
1967	4,727.28
1968	4,961.27

or a total of $21,549.30.

On February 20, 1969, Heublein commenced this action for the recovery of the taxes paid under protest, together with interest.

The bulk of Heublein's activities within South Carolina relates to the importation, sale and delivery of its liquor products. During the years in question, Heublein had one employee in South Carolina, a Mr. Billy J. Belch, who resided in Columbia and who was a full time employee of Heublein.

In 1958, South Carolina passed legislation regulating the importation of alcoholic beverages into the State. This legislation appears as Article VII of the Alcoholic Beverage Control Act, Sections 4-131 to 4-150, 1962 Code of Laws of South Carolina. This Act provides that only "registered producers" may ship alcoholic liquors into the State, and that such liquors may be delivered only to the producer's "producer representative" who then may make delivery of the liquors to licensed wholesalers within the State. Shipments from without the State are to be made only by common carrier authorized to do business in South Carolina as such by the South Carolina Public Service Commission. Mr. Belch, Heublein's salesman and only employee in the State, was designated and qualified as its "producer representative."

The regulations issued by the Commission implementing the above Act provide that upon arrival in South Carolina and upon completion of delivery to the producer representative, the liquor shipment must either be stored in a licensed warehouse of a registered producer or turned over to a wholesaler pursuant to a certificate of transfer applied for by the producer representative and approved by the South Carolina Tax Commission. Heublein maintains no

such warehouses in South Carolina, hence all shipments into the State are turned over to the wholesaler in response to whose order the shipment was made.

In practice, shipments of alcoholic liquors into South Carolina were in response to orders of the Ben Arnold Company and were delivered to Heublein's producer representative at the wholesaler's address. Heublein, in compliance with the regulations prescribed and upon the forms prescribed, sent copies of the invoice and of the bill of lading to the Alcoholic Beverage Control Commission and to Mr. Belch. Upon arrival of the shipment by common carrier at the wholesaler's address, consigned to Heublein in care of Mr. Belch, the latter turned the shipment over to the wholesaler pursuant to a certificate of transfer obtained from the Commission in the manner previously indicated. He also, upon acceptance of delivery, furnished the Commission with a copy of the invoice with an endorsement thereon showing the date and place the delivery was accepted.

Heublein's liquor sales to military bases within South Carolina were treated in the same manner as other liquor sales with the exception that shipments were delivered to the military base, consigned to Heublein in care of Mr. Belch, instead of being delivered to the address of the wholesaler.

In addition to the activities referred to above pertaining to Heublein's sales of liquor products in South Carolina, Heublein sells food products in the State. Nonresident salesmen come into South Carolina and solicit orders which are sent out of the State for acceptance or rejection. If accepted they are filled by shipping goods from warehouses without South Carolina.

Heublein had a warehouse in South Carolina where it stored food products until January 31, 1963, at which time the warehouse was disposed of.

W. CROFT JENNINGS, JR.,
ROBERTS, JENNINGS & THOMAS,
Attorneys for Plaintiff.

DANIEL R. McLEOD,
Attorney General of South Carolina,
G. LEWIS ARGOE, JR.,
Assistant Attorney General of South Carolina,
JOE L. ALLEN, JR.,
Assistant Attorney General of South Carolina,
Attorneys for Defendant.

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

TESTIMONY OF BILLY J. BELCH

(Tr., pp. 17-27)

Mr. B. J. Belch, a witness for the Plaintiff, who after being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Belch, will you give your name, please?

A. Billy J. Belch.

Q. What is your job?

A. I'm a salesman. I have the title of State Manager in the State of South Carolina of Heublein as producer representative.

Q. Was this during the years of 1964 to 1968, the years in question?

A. Yes.

Q. As salesman and producer representative in South Carolina, what were your duties, what did you do?

A. To promote the sale of Heublein liquor products in the State of South Carolina.

Q. How did you do that?

A. By holding distributor sales meetings, by teaching distributor salesmen about our product to better inform them and let them know something about the history of our products so they could close their deals, to call on retail accounts and give them products story and reasons why they should use Heublein products.

Q. Who made the orders for Heublein products for South Carolina?

A. The distributor, our wholesaler.

Q. Did you have occasion to pick up an order from retail stores?

A. On rare occasions.

Q. What would you do with these orders?

A. Well, the order would be turned over to the wholesaler who would in turn bill and invoice. He would bill and ship the order in question.

Q. So it would be turned over to the Ben Arnold Company, is that your distributor in South Carolina?

A. That's true, Ben Arnold.

Q. And he would make an order pursuant to the order he had received from the retail man?

A. That's true.

Q. Does Heublein or did Heublein in the years in question have an office in South Carolina?

A. State that question again.

Q. Did Heublein have an office with its name on it?

A. No.

Q. Did it have a listing in the telephone directory in South Carolina?

A. No.

Q. Did Heublein own any automobile in the State of South Carolina?

A. No.

Q. It did not own the automobile you used?

A. No.

Q. Did Heublein have a warehouse in South Carolina?

A. No.

Q. Did it have a mailing address in South Carolina?

A. No.

Q. Did you provide your distributor salesmen with promotional material?

A. Yes.

Q. How about retail stores?

A. Yes.

Q. Did you have a sample allowance from Heublein Company?

A. Yes.

Q. Approximately how much was it?

A. About $40.00 a month.

Q. How did you use this sample allowance?

A. Well, most of the sample allowance was used for self-entertainment or I would say entertainment purposes. Some of it used was for personal consumption. Most of it, I would say, was used when I was travelling with a distributor salesman and at night, of course we wanted them to try out our products and use our products, of course, while I was travelling with them.

Q. You'd be on the road with them and in the evenings?

A. Very true.

Q. And you'd rather use Heublein products than somebody else's products?

A. Very true.

Q. Did you yourself have an office?

A. Yes, I have a personal office at home.

Q. Were you given any desk space at the Ben Arnold Company?

A. Yes, I had desk space at the distributor.

Q. What would you use this desk for at Ben Arnold Company?

A. Well, to make necessary reports that were required like marketing reports and I also used this space if I wanted to talk to an individual salesman about a particular product.

Q. Wasn't your desk space chiefly used to fill in the forms required by the South Carolina liquor law?

A. Yes, that's true.

Q. Did you pay, or did Heublein pay any rent for this desk space at Ben Arnold?

A. No.

Q. Did you ever collect a deposit from anybody on any order made for Heublein products?

A. No.

Q. Did you ever collect any money on Heublein?

A. No.

Q. Did you ever carry with you any Heublein products for sale?

A. No.

Q. With regard to the activities which you did on behalf of Heublein in compliance with South Carolina liquor law, that is filling out the necessary forms, making the transfers and so forth, would you have done this if it had not been required by law, by South Carolina law?

A. No.

Q. You were a salesman in South Carolina before this law that we're concerned with came into effect, is that right?

A. Yes, sir, a few months.

Q. And you did not engage in any of these activities before the law came into effect?

A. No.

Mr. Jennings: I have no further questions.

CROSS EXAMINATION

By Mr. ARGOE:

Q. Mr. Belch, you testified that your main responsibilities and duties were promoting the products of Heublein. Is it correct that you have never driven an automobile in South Carolina owned by Heublein?

A. That is true.

Q. In other words, you drive your own automobile in making your calls?

A. Yes, sir.

Q. Are you provided an expense allowance for the purpose of driving—covering your expenses?

A. Yes, sir.

Q. That would cover your automobile expenses as well?

A. Yes, sir.

Q. You state that you picked orders, and I was not clear from who you picked up orders. Do you on occasion pick up orders from retailers?

A. I have on occasion picked up orders from a retailer for delivery from the wholesaler.

Q. And you state this is only on rare occasions? What would be a rare occasion in your opinion?

A. Say that possibly I were calling on a retail package store and he would say "Bill, I'm short of half pints Smirnoff Vodka and would certainly like a case." I would certainly pick up the telephone and call my distributor and tell him to ship this customer a case.

Q. Did that occur frequently?

A. That particular occurrence, not too frequently.

Q. Were you in constant contact with the Ben Arnold Company?

A. Yes, sir.

Q. When in constant contact—would that mean a daily contact with them?

A. No, sir.

Q. Would you say every other day?

A. No, I would say at least weekly contact.

Q. Weekly contact? Did you take orders directly from the Ben Arnold Company and send those orders on to Connecticut where they were filled?

A. Only on rare occasions.

Q. How are the orders handled in this regard?

A. Well, the distributor checks his inventory every so often and of course submits orders directly to the distillery for shipment.

Q. Were you provided a copy of that order?

A. Yes.

Q. When it was made or before it was made?

A. Usually I picked up my copy of the order when I came into the office. Usually it was after the fact.

Q. Did you keep a sales record for your purposes regarding these orders?

A. Yes.

Q. You have stated that you were provided desk space at the Ben Arnold Company. Was this desk space used weekly, or monthly, or very often?

A. It was used at least weekly.

Q. So far as—you stated that you had no mailing—that Heublein maintained no mailing address in South Carolina. In the event that you were sought by your employer, were you called at the Ben Arnold Company or were you called at home?

A. Usually I was called at home and my wife could give them information unless I specifically put on an itenirary [*sic*] where I would be, and of course they could reach me at motels where I might be.

Q. Were you compensated in any way for the office space maintained at your residence, at your home?

A. No, sir.

Q. This was purely a personal office space maintained by you?

A. Yes, sir.

Q. Did you use that in performing your functions in any way, keeping your records?

A. Yes, sir.

Q. In other words you conducted or transacted business in the name of Heublein Company's office in your home?

A. Yes, sir.

Q. So far as you state that you were allowed and carried with you certain promotional material relating to the products and the sales products of Heublein, where did you keep these materials generally, store them?

A. The distributor has a warehouse where this merchandise is stored, a merchandising warehouse.

Q. Could you give us some idea of what kind of materials we are talking about?

A. Yes. Of course we had—most of the materials were of a cardboard or wire nature, display, case cards, pamphlets, booklets, recipes, and this kind of material used for building displays, stores.

Q. And would you restate where you kept these, where these were stored?

A. These were stored in the distributors display house in a room.

Q. Did you carry those materials with you in an automobile for the purpose of distributing them among retailers?

A. Yes.

Q. Are you familiar with and basically aware of all of the retailers in South Carolina, the retail liquor dealers in South Carolina?

A. Yes, at one time I think I knew them all pretty well.

Q. You called upon them often?

A. As often as I could.

Q. You state also that you had a sample allowance which is an allowance of liquor for which you state you use for self entertainment, travelling use, distribution. Would you restate the amount of that allowance?

A. I said about forty dollars a month.

Q. Where did you acquire this liquor that you used in your sample allowance?

A. Many times I purchased it from retail package stores. On occasions I have purchased the merchandise from the distributor warehouse.

Q. In so doing, would you be reimbursed by Heublein for the amount of the purchase?

A. Yes.

Q. Does Heublein maintain—excuse me—does Heublein sell to any other distributor or wholesaler other than the Ben Arnold Company?

A. Yes. We had one other distributor. Now, the time in question here is—

Q. '64 to '68.

A. I think we possibly had Columbia Distributor for a few of our products during the latter part of that period. The exact date, of course, I can't remember.

Q. So far as your functions are concerned under the Alcohol or Beverage Control Act, you were registered as a producer representative at that time with the Tax Commission?

A. Yes.

Q. And you performed all the functions required pursuant to the Alcohol Beverage Control Act?

A. I should hope that I did.

Q. Could you give us an idea, a statement as to the handling of alcoholic liquors shipped into South Carolina without the bounds of this state, how they were handled during this time and how in your responsibilities and requirements you were turning this liquor over to the wholesaler?

A. Yes. In other words, you want me to go into from the time the order was placed until it was shipped?

Q. I would just like a brief statement regarding the handling and importation of that liquor into South Carolina.

A. All right. Well, actually an order is placed by a wholesaler or a distributor to a distillery. The distillery either accepts or rejects the order depending after the order has been checked for credit and whether this particular distributor is set up to sell this particular brand in the State. The order is then shipped directly to the distributor by motor freight line. At the time the shipment is made the distillery sends a copy of the invoice along with the copy of the original bill of lading to the Tax Commission or the ABC Commission. They send necessary copies of the invoice to the distributor. When the shipment is made they usually send three copies of the invoice to me. They were supposed to send three copies of the invoice to me. One of these copies I used as a receiving report for the Tax Commission or the ABC Commission and one I signed as transmittal papers to turn the merchandise over to the distributor and I made out the necessary permit required by the Tax Commission or the ABC Commission during that time and submitted these along with the two copies of the invoice, the one I used for receiving report and one as transmittal papers. That was pretty much it.

Q. And once you received the papers or the approval of the Tax Commission or ABC Commission this liquor was sent over to Ben Arnold Company or to the purchaser, is that correct?

A. Well, this was usually after the fact, Mr. Argoe. In other words, many times these invoices they have issued come in before the shipment and I may have been out of town at the time the invoices came in.

Q. Referring back to one further question regarding the handling of orders—is it—do you have knowledge, do you have the knowledge as to any instance where Heublein refused to fill an order of the Ben Arnold Company?

A. No, sir.

Q. Whether that order be accepted—whether that order be sent by the Ben Arnold Company to Heublein in Connecticut directly or whether or not you took the order and sent it in to Connecticut?

A. I don't remember ever sending in an order myself personally.

Q. You never forwarded an order, an order taken from the Ben Arnold Company to the home office in Connecticut?

A. Not a so-called paper order. I used the telephone to call additional orders.

Q. You have called in orders and these orders were as a practice always filled, provided that they could have been filled?

A. That's true.

Mr. ARGOE: No more questions, thank you.

RE-DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Belch, when Mr. Argoe asked you if you did transact Heublein business from your home, weren't you really filling out the papers that you're required to fill out and used your home as an office in your activities with Heublein?

A. That's true.

Q. You weren't doing any selling from your home or filling of orders from your home?

A. No.

Mr. JENNINGS: No other questions.

The COURT: Thank you, sir.

TESTIMONY OF MICHAEL F. EGAN

(Tr., pp. 27-38)

Mr. Michael F. Egan, a witness called by the plaintiff, who after being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Egan, what is your title with Heublein?

A. I'm manager for order entry.

Q. How long have you been associated with Heublein?

A. Approximately six years.

Mr. ROBERTS: You said order entry?

A. Yes, sir.

Q. Are you familiar with the way Heublein does business in South Carolina during that time?

A. Yes.

Q. Would you explain how a typical order from the South Carolina distributor which I understand is solely Ben Arnold has been handled?

A. In the case of Ben Arnold almost all of their orders are typewritten orders from Ben Arnold transmitted through the mail to our Hartford office.

Q. I wonder if I might give you some orders. Is this a typical purchase order and accompanying papers?

A. Yes, sir.

The COURT: Mr. Argoe, have you seen these?

Mr. ARGOE: Yes, sir.

The COURT: Take a look at them and see if you have any objections.

Mr. ARGOE: May I ask Mr. Brown to bring his chair over here so I might confer with him?

The COURT: Certainly.

Mr. ARGOE: We have no objection.

The COURT: Just mark them as one exhibit. Just hand them to the reporter.

(Sheaf of orders received as Plaintiff's Exhibit No. 1.)

Q. Now, Mr. Egan, would you explain what those papers are and what happens?

A. Well, the first copy is the customer's purchase order prepared by the customer and it's forwarded through the mail to our Hartford office.

The COURT: Give a date if you have any and invoice number.

A. It was purchase order number—

Mr. ARGOE: Your Honor, may I ask one question here. I note the date is a 1969 date. Would counsel for the plaintiff submit that this is the way all of the transactions were handled during the years '64 to '68?

Mr. ROBERTS: Yes, sir. We couldn't find those. He will so testify.

Q. All right. When you get the purchase order from Ben Arnold Company—I take it Ben Arnold Company is your sole purchaser from South Carolina, is that right?

A. Our sole four line distributor. We have one other distributor.

Q. With the purchase—when the purchase order arrives from Ben Arnold, what happens, what do you do with it?

A. It's received in the order entry department and at that point is transposed onto our purchase order form, the Heublein purchase order form.

The COURT: That's this long document with the various brands set out on it?

A. Yes, sir.

Q. What is the purpose?

A. The purpose of transposing that to our form is to make it more readily available for the key-punch operator to prepare for the computer. Most of our customers have various purchase order forms so as to make it uniform, we have devised our own purchase order and all orders are transposed over on this purchase order to make it more easily available for the girl to punch with all the pertinent information from the original purchase order as to number, routing and as far as the shipping date on the file, right hand corner, "ship date", on the long purchase order form. This will be the date the merchandise is to be shipped from Hartford to Ben Arnold.

Q. What is the next piece of paper?

A. From the long purchase order form a hard copy is produced, an order acknowledgment. This is a five part form which is sent back through the mail to the customer acknowledging his order, his order number, when we will ship it and the exact merchandise on the order.

Q. What does it say on there with regard to the billing process, anything?

A. At this point there is nothing, there's no relation to the billing.

Q. Is there a notation there on freight collect?

A. Yes, sir, there is.

Q. What does that mean to Heublein?

A. Once the merchandise leaves our door—

Mr. ARGOE: I'd like to impose an objection to any testimony relating to the freight and to the responsibility for that freight as being *contra* to the ABC law inasmuch as the ABC law requires that liquor be shipped into South Carolina only to a producer representative and thereafter turned over to the wholesaler or the distributor and anything regarding the shipment to Hartford to South Carolina being assumed by the wholesaler would be *contra* to the ABC law which requires that the liquor be delivered from a point within South Carolina by Heublein to the wholesaler, in this case the Ben Arnold Company.

The COURT: Well, is the procedure that is being outlined generally the procedure followed by all of these whiskey or liquor manufacturers in shipping their product into South Carolina, or are they required to—would Heublein be required to actually have a warehouse or building into which the products were unloaded and then reloaded and sent to Ben Arnold?

Mr. ARGOE: Your Honor, that is specifically answered and required by law, specifically Section 4-141. They're either required to have a warehouse in South Carolina, or either they are required to accept delivery, the producer representative is required to accept delivery in Heublein's name in South Carolina and thereafter turn that shipment over to the wholesaler. Now, if you'll bear with me, I'd like to read one sentence which I think would be better lan-

guage than my words and that sentence is "Immediately upon acceptance of delivery of the shipment by the producer's representative, the producer's representative shall furnish the Tax Commission with a copy of the invoice covering the shipment with endorsement thereon showing times and date—" I'm afraid that's not the one I meant. "Alcoholic liquors shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property as the registered producer of the originating shipment." This is all set out in 4-141 and 4-142, the requirements that must be followed to import from without the State liquor into the State.

The COURT: It's your interpretation then, of that law, that Heublein or any other manufacturer of similar products would be required to actually have in existence some type of warehouse or building in to which the shipment was unloaded and then to be reloaded and taken to the distributor?

Mr. ARGOE: Physically, it does not have to be handled that way. This is set out by law and it does not have to be handled that way but as a matter of law, Heublein has no authority to deliver liquor directly to a wholesaler in South Carolina. They must deliver that liquor to a producer representative and thereafter, that liquor may be turned over or delivered to the wholesaler. This is specifically set out in this section.

The COURT: Well, let's assume as has been testified to that Mr. Belch has a desk at Ben Arnold's office. Wouldn't it be practical for the shipper to come to Mr. Belch with the shipment at the Ben Arnold office and hand him a document and say that the product that was ordered is outside in the truck and then for Mr. Belch to notify Ben Arnold and it be unloaded into Ben Arnold's warehouse?

Mr. ARGOE: In practice that is accepted by law, but delivery must be made directly to the producer representative. In practice the liquor may be delivered, consigned to this particular destination or point, but by law, they are required to accept delivery. Heublein cannot ship from without the State liquor direct to the wholesaler within the State.

Mr. ROBERTS: I think I might be able to clarify that a little bit. I don't think Mr. Argoe disputes the method of handling. I think he's got in mind simply about where title passes and that is marked FOB in Connecticut. I don't think where title passes has anything to do with it. I gather that's what he's complaining about, that this FOB shipment might have some bearing where title passes. We don't think it make any difference. He doesn't deny we're doing what the statute says.

The COURT: Mr. Argoe, despite the fact of the testimony as to the manner in which a shipment is handled may be in violation of the statute and apparently it's your opinion that it is, that would not make the testimony of the witness not receivable by the Court. It would not be objectionable because of the fact that they may have handled the shipment in some manner that did not legally meet the requirements of the statute, and of course that's one of the questions that I will have to determine. But I will have to receive the testimony as it's being offered. So your objection to the testimony is overruled. You may proceed, Mr. Jennings.

Q. We were on the acknowledgment form that is noted on there. I believe you said the notation is freight collect?

A. Yes, it is.

Q. What does that mean to Heublein?

A. Freight collect meaning that the recipient of the merchandise will pay the freight charge.

Q. Does South Carolina—I guess all the States require stamps on alcoholic beverages. How is the stamp problem treated with South Carolina shipments?

A. At the time the customer prepares his purchase order he requests the ABC Board of South Carolina, or purchases the quantity of stamps needed and these stamps are in turn forwarded to Hartford and are affixed to the bottle of the merchandise produced.

Q. In Hartford?

A. In Hartford.

Q. What else is in that form?

A. After the acknowledgment form is prepared and mailed to the customer acknowledging the order, the next

form would be the bill of lading which is prepared at time of shipment stating much of the same information, cases that were shipped, the date that it was shipped, serial number of cases that were shipped and this document goes along with the trucker; at the time the invoice is generated another copy goes with the invoice and also Ben Arnold Company receives a copy.

Q. You're talking about the bill of lading now. What about the invoice?

A. Another copy of the bill of lading is internally forwarded to our billing department and at that time invoices generate from the bill of lading.

Q. There are two other pieces of paper, I believe, production order—is that in that pack that I gave you?

A. At the time the order of acknowledgment is typed and mailed back to the customer acknowledging his order a paper tape which is generated from the computer will create a production order to our department in Hartford giving them authority to produce this order, giving them the same information that is on the order acknowledgment. This tells our production department that this merchandise has to be ready by the date scheduled for shipment.

Q. Is there a packing list?

A. The packing list is a part of the bill of lading. In other words, the packing list is generated with the bill of lading. We're talking about multicopy forms. Every document we produce there are at least five or six copies which are mailed outside and internally in the company satisfying this requirement. When the bill of lading is generated the packing list is also a part of the bill of lading because of distribution of bills of lading going out of the company and within the company, a packing list goes along with the bill of lading to our billing department. The packing list and the bill of lading is one and the same, is used to generate our invoice which is the copy attached to the packing list. There again the invoice has the pertinent information as to the customers purchase order, the date the merchandise was shipped and means of transportation, type of freight charges and terms, quantity, per case price and total extension.

Q. Mr. Egan, I believe there are some differences in dates and numbers on those forms. Would you explain why the difference?

A. We tried to go back as far as we could to get a particular sample of an order in '69. These are three months requirements we have retaining our forms. We no longer have any '69 forms so what we did was get our most recent order, which are handled the same way now as they were at the time in question. So on the blue acknowledgment, the number is different, but the procedure is the same and the forms are the same. Back in '69 once a shipment is billed and payment received from the customer, after a period of two or three months, we discard the paper work because the transaction is consummated.

Q. When Ben Arnold receives the shipment and makes payment, how do they make payment?

A. Ben Arnold will make payment by check through the mail to the nearest lock box. We have a regional lock box.

Q. Where is the nearest regionable lock box?

A. In this case I believe it is in Atlanta, Georgia. In other words, the invoice stipulates on the right hand corner, please remit to Heublein Company, Box 3395, Atlanta, Georgia.

Q. You do not have a lock box in South Carolina?

A. No, we don't.

Mr. JENNINGS: No further questions of Mr. Egan—just one other thing—

Q. Mr. Egan, when the purchase order comes in, what options do you have in treatment of that purchase order? Do you have the option to accept it or reject it?

A. Yes, we do. The policy when the order comes into the Hartford order entry a credit check is made and at that time it is determined whether we will honor the order or reject it. Once a customer receives a copy of acknowledgment that means we will accept the order and will ship.

Mr. JENNINGS: Answer any questions Mr. Argoe has if you please, Mr. Egan.

CROSS EXAMINATION

By Mr. ARGOE:

Q. Can you recollect any instance where the liquor was not delivered or the delivery was refused to Ben Arnold Company?

A. No, sir.

Mr. ARGOE: I have no further questions.

The COURT: I probably made a mistake in marking these forms as one exhibit. You referred to these papers by various names. Go through the transaction again, naming the documents and hand them one at a time to the Reporter. Jim, you mark them A, B, C and D and so forth.

A. The first copy is the customer purchase order made out by the customer and sent through the mail to Hartford.

(Customer purchase order marked Exhibit No. 1-A.)

A. The next exhibit will be our internal purchase order form whereby we transpose the customers purchase order onto our own form.

(Internal purchase order marked Exhibit No. 1-B.)

A. The next exhibit is our order acknowledgment which is typed from the purchase order form, acknowledging the customer's order.

(Order of acknowledgment marked as Exhibit No. 1-C.)

A. And the next exhibit is the production order which directs our department to go ahead and produce this product for Ben Arnold.

(Production order marked as Exhibit No. 1-D.)

A. The next form is the bill of lading which is produced at the time of shipment.

(Bill of lading marked as Exhibit No. 1-E, and packing list.)

A. The bill of lading and the packing list are one and the same. You might want to attach these two together. These are one and the same. The last document in our cycle is the customer invoice.

(Customer invoice marked as Exhibit No. 1-F.)

The COURT: Are you acquainted with what happens in South Carolina when the shipment arrives?

A. Yes, sir.

The COURT: Give us that information.

A. The first acknowledgment we make is the Bill of lading is produced at time of shipment, when the merchandise will leave. At the same time we mail a bill of lading to Mr. Billy Belch. The merchandise is received at the Ben Arnold location. Mr. Belch will turn over his document to the Ben Arnold Company, in other words, releasing the merchandise over to Ben Arnold.

The COURT: And it will be unloaded in the Ben Arnold warehouse?

A. Yes, it will.

The COURT: Is there anything further?

Mr. ARGOE: No, sir.

Mr. JENNINGS: We have nothing further.

The COURT: Thank you, sir.

Mr. JENNINGS: Your Honor, that's all the testimony we have this morning.

The COURT: Mr. Argoe, do you have some testimony you want to offer?

Mr. ARGOE: Yes, sir, I would like to call Mr. Norwood Gale for one or two questions.

(Defendant's case.)

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

ORDER

At issue in this case is the South Carolina income and license tax liability of Heublein, Inc. for the years ending June 30, 1964 through 1968, inclusive. On or about January 2, 1969, the South Carolina Tax Commission ruled that Heublein, Inc. was responsible for these taxes. On February 1, 1969, Heublein paid these taxes, amounting to $21,549.30, including interest, and brought timely suit to recover same. This case was heard by me on July 28, 1970, and thereafter briefs were submitted by both parties.

The defendant, the South Carolina Tax Commission, is a department of the government of the State of South Carolina. The plaintiff, Heublein, Inc., is a Connecticut corporation with its principal office in Hartford, Connecti-

cut. It manufactures alcoholic beverages which are sold throughout the United States, including South Carolina.

Heublein challenged the assessments on the ground that it was not liable for the taxes by virtue of Public Law 86-272.[1]

In 1958, South Carolina enacted legislation, appearing as Article VII of the Alcoholic Beverage Control Act, §§ 4-131 to 4-150 of the South Carolina Code of Laws, 1962. This statute requires, among other things, that a person shipping alcoholic liquors into South Carolina shall register with the Commission as a "registered producer" and appoint a "producer-representative." Each time alcoholic liquors are shipped from without the State into South Carolina, they must be consigned to the registered producer in care of the producer-representative, who is required to deliver the goods to the purchaser after obtaining from the Commission permission for transfer. The shipper is required to mail to the Commission and the producer-representative a copy of the invoice covering the shipment. The producer-representative certifies as to delivery on the invoice copy sent to him and mails it to the Commission.

During the years in question, Heublein had one employee in South Carolina, a Mr. Billy J. Belch, who resided in Columbia and was a full-time employee. The Ben Arnold Company, Inc. of Columbia was the wholesaler who acted as the distributor of Heublein products in South Carolina.

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[1] 15 U. S. C. § 381. *Imposition of net income tax—Minimum standards.*

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and,

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The act continues, but it is sufficient for the purpose of this Order to restrict ourselves to the above quoted portion.

In South Carolina, Heublein has no office, no warehouse, no telephone listing, no automobile, and no mailing address. Mr. Belch had an office in his home. Mr. Belch worked to further sales of Heublein's products in South Carolina in two ways. He would brief the salesmen of the Ben Arnold Company, to better inform them and to let them know something of the history of the Heublein products. He would also call upon Ben Arnold's retail accounts, tell them about Heublein products, and leave promotional materials with them. Mr. Belch had a sample allowance of about $40.00 a month which he used for personal consumption and for entertainment. Occasionally, when on the road, Mr. Belch would pick up an order for Heublein's products from a retailer and, as an accommodation, deliver it to the Ben Arnold Company. Orders for Heublein products would be placed by the wholesaler, the Ben Arnold Company, with Heublein's home office in Hartford, Connecticut. When the order was accepted, an acknowledgment would be sent from Heublein to the Ben Arnold Company and Heublein would indicate when the order would be shipped. In Hartford, the goods ordered would then be prepared for shipment and South Carolina Alcoholic Beverage Stamps, supplied by the Ben Arnold Company, would be affixed. When shipped, these items moved by common carrier, F.O.B. Hartford, Connecticut, consigned to Heublein in care of Mr. Belch at the premises of the Ben Arnold Company. Ben Arnold made payment to Heublein for the orders by sending checks to a lock box in Atlanta, Georgia.

The statute and the regulations issued by the Tax Commission implementing the above act provide that upon arrival in South Carolina and upon completion of delivery to the producer-representative, the alcoholic beverages must either (1) be stored in a licensed warehouse of the registered producer or (2) be turned over to a wholesaler, pursuant to a Certificate of Transfer applied for by the producer-representative and approved by the Tax Commission. Heublein maintained no warehouse in South Carolina, hence all shipments into the state were turned over to the wholesaler in response to whose order the shipment was made. In practice, shipments of alcoholic beverages into

South Carolina were delivered by the common carrier to Heublein's producer-representative at the wholesaler's address. Heublein, in compliance with the regulations prescribed and upon the forms prescribed, sent copies of the invoice and of the bill of lading to the Alcoholic Beverage Control Commission and to Mr. Belch. Upon arrival of the shipment by common carrier at the wholesaler's address, consigned to Heublein in care of Mr. Belch, Mr. Belch turned the shipment over to the wholesaler pursuant to the Certificate of Transfer obtained from the Alcoholic Beverage Control Commission in the manner previously indicated. Mr. Belch also furnished the Alcoholic Beverage Control Commission a copy of the invoice, with an endorsement thereon showing the date and place delivery was accepted. To facilitate the paper work involved in complying with the mechanics of the statute, the producer-representative was given desk space at the Ben Arnold Company, and for this desk space Heublein paid no rent.

Prior to the passage of the 1958 South Carolina legislation, Heublein did not engage in any of the activities specifically required by this legislation.

Heublein maintains that Public Law 86-272 is controlling. This act was passed as the reaction of Congress to the United States Supreme Court decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450, 79 S. Ct. 357 (1959). In this case, the Supreme Court was asked to decide whether certain activities of the taxpayers, corporations engaged in interstate commerce, were sufficient to provide a nexus with the state so that there might be an income tax levied on the corporations as a result of such activity. The Supreme Court, in answering this question, provided broad, general language to the effect that if the income tax was "not discriminatory and is properly apportioned to local activities within the taxing State," the state may subject the corporation to a state income tax.

This decision caused a great deal of consternation among the firms engaged in interstate commerce. Senator Harry Byrd of Virginia, Chairman of the Senate Finance Committee, in the Committee Report on what became Public Law 86-272, gave reasons for the concern. The Report

pointed out that there were (at that time) at least thirty-five states, the District of Columbia, and some eight cities which taxed business income, including earnings derived from interstate commerce, where there was some local business activity. Of all these taxing entities, no two had the same apportionment formula and all had widely varying definitions of the word "sale." It was apparent that unless some uniformity were introduced into the field of state taxation of interstate commerce, many businesses, particularly small or medium size ones, would be reluctant to expand their operations, and the implications for the national economy might well be unfortunate. In accordance with the need envisioned by the Senate Finance Committee, the Interstate Income Tax Law, Public Law 86-272, was enacted to provide uniformity and certainty in the area of state taxation of net income derived from interstate commerce. This act, which was approved September 14, 1959, provides that a state may not impose an income tax on income derived within that state from interstate commerce if the only business activity within the state does not exceed certain minimum standards. In essence, these minimum standards are (1) solicitation of orders within the state which (2) are sent outside the state for approval or rejection and, (3) if approved, are filled by shipment or delivery from a point outside the state. Heublein points out that Public Law 86-272 does not adopt the criterion of "sale," but rather the more specific criterion of sending of orders out of the state for acceptance, and shipment or delivery from a point outside the state.

Public Law 86-272 was held to be constitutional in *Smith, Kline & French Lab. v. State Tax Comm'n.*, 403 P. (2d) 374 (Ore. 1965); *State ex rel CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n.*, 382 S. W. (2d) 645 (Mo. 1964); and *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. (2d) 314 (1964), *cert. denied*, 379 U. S. 902 (1964).

Heublein maintains that all of its activities within South Carolina come within the minimum activities allowable by Public Law 86-272. Heublein's activities fall into two categories: first, the activities which Heublein does of

its own volition and, second, the activities which Heublein does only because it is required to do so by the South Carolina liquor laws.

Setting aside for the moment these activities which Heublein does as a result of state compulsion, I am of the opinion and so find that all other activities of Heublein come within the minimum allowable by Public Law 86-272. These activities engaged in by Heublein are very similar to the activities which have been previously considered by courts and found to be acceptable as within the minimum permitted by Public Law 86-272. *See, e. g., Smith, Kline & French Lab. v. State Tax Comm'n., supra; and, State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n., supra.*

I now turn to a consideration of whether the activities which Heublein was forced to do by the reason of the South Carolina Alcoholic Beverage Control Laws are sufficient to cause Heublein to come without the protection of Public Law 86-272. In this instance, Heublein is compelled by the State to follow a specific statutory procedure in making delivery from without the State to the wholesaler-purchaser within the State. The State may prescribe the delivery procedure, but compliance with such requirements cannot deprive Heublein of the effectiveness or applicability of the federal law on this subject. Such state-imposed minimum requirements therefore come within the minimum activities protected by Public Law 86-272. To hold otherwise would set the various taxing authorities free to devise all manner of restrictive regulations so that they might avoid the effect of Public Law 86-272.

Accordingly, I find and hold that Heublein did not exceed the minimum activities permitted by Public Law 86-272, and therefore Heublein is not liable for South Carolina income or license taxes.[2]

Heublein has also maintained, and I think correctly, that even if it were decided that because of its compliance with the South Carolina Alcoholic Beverage Control Laws Heublein has exceeded the minimum requirements of Pub-

[2] The license tax must fall since it is predicated on liability for income tax.

lic Law 86-272 (which I have found not to be the case), nevertheless Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power.

The State's power under the twenty-first amendment to the United States Constitution is to regulate the liquor traffic. This power is not challenged by Heublein. However, the police power and the power to tax are two separate and distinct powers. This point was made quite clear in *Oklahoma Tax Comm'n. v. Brown-Forman Distillers Corp.*, 420 P. (2d) 894 (Okla. 1966). There is no substantial difference in the position taken by the Oklahoma Tax Commission in *Brown-Forman* (that simply because a corporation deals in alcoholic beverages the state can impose an income tax) and the position taken by the South Carolina Tax Commission in this case (that because a corporation deals in alcoholic beverages the state can make it do certain things and when it does those things the state can then subject it to an income tax). Neither the state nor its tax authorities may use the state's police power over the liquor traffic so as to subject a foreign corporation to a state income tax in circumstances where it would not otherwise be liable. Such would be a patent abuse of the state's police power.

I hold that following the regulations legally prescribed by the State for importing alcoholic beverages from without the State is but a step in the "shipment or delivery" of the goods referred to in Public Law 86-272; but, if such compliance be regarded as performance by Heublein of acts beyond the minimum requirements set up by Public Law 86-272, such acts are done under compulsion and cannot be invoked to subject Heublein to an income tax from which it otherwise is protected by the Act of Congress.

Accordingly, the Court hereby certifies of record, in accordance with § 65-2662, South Carolina Code of Laws, 1962, that taxes in the amount of $21,549.30 have been wrongfully collected from Heublein, Inc. by the South Car-

olina Tax Commission and ought to be refunded, together with interest at the legal rate from February 1, 1969.

AND IT IS SO ORDERED.

JOHN GRIMBALL,
Resident Judge,
Fifth Judicial Circuit.

Columbia, South Carolina,
February 18, 1971.

IN THE SUPREME COURT OF SOUTH CAROLINA

HEUBLEIN, INC., RESPONDENT,
versus
SOUTH CAROLINA TAX COMMISSION, APPELLANT
[254 S. C. 17, 183 S. E. (2d) 710 (1971)]

Opinion No. 19289
Filed September 22, 1971

REVERSED AND REMANDED

Attorney General Daniel R. McLeod and Assistant Attorneys General Joe L. Allen, Jr., and G. Lewis Argoe, Jr., all of Columbia, for appellant.

Carlisle Roberts and W. Croft Jennings, Jr., both of Roberts, Jennings & Thomas, of Columbia, for respondent.

LEWIS, A. J.: The question to be decided is whether respondent, Heublein, Inc., a Connecticut corporation, is liable to the State of South Carolina for income and license taxes assessed on the basis of Heublein's sales of alcoholic beverages in the State for the years 1964-68. The taxes were assessed by the appellant, South Carolina Tax Commission, paid under protest, and this action brought by Heublein to recover the taxes so paid. The lower court, in accord with Heublein's contention, held that Heublein was exempt from the payment of income and license taxes to South Carolina by virtue of the provisions of an Act of Congress, referred to as Public Law 86-272, the pertinent portion found in 15 U. S. C. A. Section 381.

Heublein's claim of exemption from taxation in South Carolina is based solely on the provisions of the foregoing Federal statute. Under its pertinent provisions, Congress enacted that no State shall have power to impose a net

income tax on income derived within the State from interstate commerce, if the only business activity within the State was solicitation of orders for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State.

Under the powers reserved to the State by the Twenty-first Amendment, South Carolina has adopted its Alcoholic Beverage Control Act which prescribes the conditions under which alcoholic liquors may be imported into the State. Sections 4-131 to 4-150, 1962 Code of Laws. This statute requires that a producer of alcoholic beverages, before shipping liquor into South Carolina, must be registered with the State and that such producer appoint a "producer-representative" who shall be a resident of the State. It is further provided that shipment of alcoholic liquors into the State must be made to the "registered representative" of the producer who must accept delivery of the liquors within the geographical limits of South Carolina. Thereafter, the producer, through his representative, is authorized to make delivery of the alcoholic liquors from within South Carolina to a licensed wholesaler in the State. The "producer-representative" then certifies as to such delivery to the appellant Tax Commission.

All shipments of liquors into South Carolina for sale must be made to the shippers own representative within the State. Delivery is then made intrastate to the purchaser and such sale can be made in no other way. These statutory provisions preclude the sale of alcoholic liquors in South Carolina through interstate sales. Such constitutes a valid exercise of the State's powers under the Twenty-first Amendment. *State v. Kilgore,* 233 S. C. 6, 103 S. E. (2d) 321, citing *Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128; *State Board of Equalization of California v. Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38.

Public Law 86-272 is applicable when delivery is made from a point outside the State and is inapplicable to sales and delivery consummated within the State.

It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272.

The taxes here in question were properly assessed against Heublein. The judgment of the lower court is accordingly reversed and the cause remanded for entry of judgment in favor of the appellant, South Carolina Tax Commission.

MOSS, C. J., BUSSEY, BRAILSFORD, and LITTLEJOHN, JJ., concur.

IN THE SUPREME COURT OF SOUTH CAROLINA

(Caption Omitted in Printing)

PETITION FOR REHEARING

Opinion No. 19289

Filed September 22, 1971

The Plaintiff-Respondent respectfully petitions the Court for a Rehearing in this case upon the grounds that:

(1) The Court overlooked the fact that the Federal Statute, Public Law 86-272, is in the alternative—that is "orders filled by shipment **or** delivery from a point outside the State." Therefore, even if delivery in this instance be considered as taking place within the State, **shipment** is from a point outside the State and thus Heublein is exempt from State income taxation.

(2) In holding that sales here were "intrastate transactions and beyond the reach of Public Law 86-272," the Court overlooked the fact that the Federal Act was passed in large measure because of the divergent views among the several state taxing authorities and among the courts as to "when title passed" or "where a sale took place," and the Act intentionally gets away from such tests. (See Transcript, pp. 48-49, ff. 191-194.)

(3) In holding that the sales here involved were "intrastate transactions and beyond the reach of Public Law 86-272," the Court overlooked the fact that the "shipment or delivery from a point outside the State," exempted un-

der Public Law 86-272, must contemplate an **effective** shipment or delivery and thus any act in compliance with a delivery procedure which is required by the State under its police power is a part of the "delivery" which is protected by the Federal Act.

(4) In holding that the provisions of the State Alcoholic Beverage Control Act preclude the sale of alcoholic liquors in South Carolina through interstate sales and "such constitutes a valid exercise of the State's powers under the Twenty-first Amendment," the Court has misapprehended the purpose and effect of the Twenty-first Amendment, which preserves to the State the right under its police power to regulate or prohibit the sale of intoxicating liquors, but does not at all affect the power of Congress to regulate and define interstate commerce in intoxicating liquors and to prescribe the income tax status of such shipments; this Court has overlooked the decisions holding that the Twenty-first Amendment has not *pro tanto* repealed the Commerce Clause of the Constitution but that both must be construed together. (See Respondent's Brief, p. 8.)

(5) It is respectfully submitted that in disposing of this case upon a narrow single point without discussion of the various issues raised the Court has overlooked the significance of the issues here involved, as applying not only to this taxpayer and the South Carolina Tax Commission, but also their significance to all other companies similarly situated both in South Carolina and alcoholic beverage manufacturers who sell throughout the United States and we suggest that a multiplicity of actions may well result from efforts to receive answers to the questions now left unresolved by the Court.

Respectfully submitted,

ROBERTS, JENNINGS &
THOMAS,
By: CARLISLE ROBERTS,
W. CROFT JENNINGS, JR.
Post Office Box 1792,
Columbia, South Carolina.
October 1, 1971.

CERTIFICATE

I hereby certify that I am a practicing attorney of the Columbia, South Carolina Bar and that I am not concerned in the above-entitled case. I have reviewed the Transcript of Record, the Brief of Appellant, the Brief of the Respondent, the Opinion of the Court in this case, and also the foregoing Petition, and in my opinion the said Petition is meritorious.

Given under my hand at Columbia, South Carolina, this first day of October, 1971.

ROBERT McC. FIGG, JR.

THE SUPREME COURT OF SOUTH CAROLINA

October 11, 1971

Carlisle Roberts, Esquire
Messrs. Roberts, Jennings & Thomas
P. O. Box 1792
Columbia, South Carolina

Re: Heublein, Inc. v. South Carolina Tax Commission.

Dear Mr. Roberts:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition Denied.

/s/ JOSEPH R. MOSS C. J.
/s/ J. WOODROW LEWIS A. J.
/s/ THOS. P. BUSSEY A. J.
/s/ J. M. BRAILSFORD A. J.
/s/ BRUCE LITTLEJOHN A. J."

The remittitur is being sent down today.

Very truly yours,

FRANCES H. SMITH,
Clerk.

FHS/F
CC: The Honorable G. Lewis Argoe, Jr.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

HEUBLEIN, INC., APPELLANT,

v.

SOUTH CAROLINA TAX COMMISSION, APPELLEE

ON APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellant appeals from the judgment of the Supreme Court of the State of South Carolina filed on September 22, 1971, reversing and remanding the order of the Court of Common Pleas, which held that the Appellant was not liable for South Carolina income and license taxes, and submits its statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Supreme Court of South Carolina delivered a written opinion in this case, the unofficial report being found at 183 S. E. (2d) 710 and the text of the opinion being set out in Appendix A, *infra*, p. 19. The Court of Common Pleas opinion is unreported. The text of this opinion is set out in Appendix B, *infra*, p. 21. The Ruling of the South Carolina Tax Commission is also unreported. The text of this Ruling is set out in Appendix C, *infra*, p. 28.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(2), this being an appeal which draws into question the applicability of South Carolina Code of Laws (1962) § 65-222 (the South Carolina corporate income tax statute) and §§ 65-602, 65-606 (the South Carolina corporate license tax statutes) on the ground that they are repugnant to Public Law 86-272 (15 U. S. C. § 381).

On February 1, 1969, the Appellant paid South Carolina income and license taxes [1] assessed by the Appellee for the years ending June 30, 1964 through 1968, and promptly brought suit to recover these taxes. Appellant claimed that the South Carolina income tax statute did not apply to it in light of the Federal Law, Public Law 86-272 which prohibits the imposition of a state income tax on income derived from sales made in interstate commerce if the business activity within the state is limited to solicitation of orders which are sent outside the state for acceptance or rejection and if accepted are filled by shipment or delivery from a point without the state. In its opinion filed September 22, 1971, the Supreme Court of South Carolina held that South Carolina Alcoholic Beverage Control Laws [South Carolina Code of Laws (1962)] §§ 4-131 to 4-150,

[1] License tax liability is dependent upon income tax liability.

App. G, *infra*, p. 29] prohibit interstate sales of alcoholic beverages; that Appellant's sales were intrastate transactions and that Public Law 86-272 was inapplicable, thereby sustaining the validity of the state statutes against the federal challenge. Appellant's petition for rehearing was denied October 11, 1971, and Appellant filed with the Supreme Court of South Carolina its Notice of Appeal to this Court on December 30, 1971.

The jurisdiction of this Court, where a state court holds a state statute to be applicable in the face of the contention that such an application is invalid on federal grounds, has been sustained in *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631 (1963); *Reconstruction Finance Corp. v. Beaver County Pa.*, 328 U. S. 204, 66 S. Ct. 992 (1946); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106 (1921).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U. S. C. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Commerce Clause of the United States Constitution set out in Appendix D hereto.

2. The Twenty-first Amendment to the United States Constitution set out in Appendix E hereto.

3. 15 U. S. C. § 381 (Public Law 86-272) set out in full in Appendix F hereto.

4. South Carolina Code of Laws (1962) §§ 4-131 to 4-150, and as amended, (the South Carolina Alcoholic Beverage Control Law) set out in full in Appendix G hereto.

5. South Carolina Code of Laws (1962) §§ 65-222, 65-602 and § 65-606 (the South Carolina corporate income and license tax provisions) set out in full in Appendix H hereto.

QUESTIONS PRESENTED

I. Where a federal statute prohibits the imposition of a state income tax on income from interstate sales, if the only activities within the state consist of the solicitation of orders, may a state render such federal law inapplicable by requiring a nonresident producer of alcoholic beverages to pass technical title to their shipments within the state through a mandatory resident representative?

II. If a nonresident does no more than the state-imposed minimum in effectuating delivery of its products can this state-required minimum exceed the minimum protected by Public Law 86-272?

III. In spite of a mandatory in-state "delivery" requirement is a nonresident protected from state income taxes by virtue of Public Law 86-272 if it fills orders by "shipment" from a point without the state?

STATEMENT

General Background

The Appellant, Heublein, Inc., is a Connecticut corporation engaged in the manufacture and sale of alcoholic beverages. The Appellee, the South Carolina Tax Commission, assessed the Appellant for South Carolina income taxes for the years ending June 30, 1964 through 1968.[2] After an adverse ruling from the Tax Commission [App. C, *infra*, p. 28, Heublein paid the $21,549.50 in taxes and interest assessed and brought suit to recover them. This suit was successful in the Court of Common Pleas but by

[2] License taxes, liability for which is dependent upon liability for income taxes, were also assessed and paid.

its opinion dated September 22, 1971, the Supreme Court of South Carolina reversed the Court of Common Pleas and ruled in favor of the Tax Commission.

During the years in question Appellant complied with the South Carolina Alcoholic Beverage Control Laws [App. G, *infra*, p. 29]. These laws were enacted in 1958 and provide that each producer of alcoholic beverages who sells its products in South Carolina must appoint a "producer representative" within the state and that all shipments of alcoholic beverages must be sent into the state in care of the producer representative who is then responsible for clearing the shipment with the South Carolina Tax Commission (now the Alcoholic Beverage Control Commission) before delivery may be made to the wholesaler in response to whose order the goods were shipped. The South Carolina statutes provide that the alcoholic beverages may be shipped either to a warehouse maintained by the producer or to the wholesaler's warehouse.

In response to the statutory requirement, Heublein appointed its sole salesman in South Carolina as its "producer representative." As Heublein maintained no warehouse in South Carolina all goods were shipped, freight collect, directly from Heublein in Hartford, Connecticut to the wholesaler's warehouse in Columbia, South Carolina. Since Heublein's producer representative was only present at the wholesaler's warehouse part of one day a week most of the shipments arrived in his absence so that the shipping documents were generally accepted by the wholesaler in behalf of Heublein's representative. Once a week Heublein's representative would take the accumulated shipping documents to the South Carolina Tax Commission and perform the required paper work transferring title to the wholesaler.

Proceedings Before the Tax Commission

When agents of the South Carolina Tax Commission insisted that Heublein was responsible for South Carolina income taxes, Heublein requested and was granted a hearing by the Tax Commission. This resulted in a Ruling adverse to Heublein's position. As stated in the Ruling [App. C, *infra*, p. 28] "[Appellant] appears before us today in protest of the assessment, contending that the income is not subject to taxation because of Public Law 86-272. That law sets up certain activities that [Appellant] may do and not be subject to taxation; however [the South Carolina Alcoholic Beverage Control Laws] requires the [Appellant], in order to legally sell its products to the wholesalers, to engage in activities in South Caroina that exceed the minimum as provided for by Public Law 86-272. [Appellant], however, contends that the South Carolina statutes are regulatory and in no way affect the taxability of the income."

Proceedings in the Trial Court

After the Tax Commission issued its adverse Ruling Heublein paid the taxes assessed and brought suit to recover them, again contending that Public Law 86-272 was controlling.

The Court of Common Pleas found that all of Appellant's activities, including those resulting from state compulsion ". . . did not exceed the minimum activities permitted by Public Law 86-272 . . ." [App. B, *infra*, p. 21] and also ruled that the state could not, through the use of regulatory requirements" . . . deprive Heublein of the effectiveness or applicability of the federal law on this subject." [App. B, *infra*, p. 21.]

The Court of Common Pleas further held that even if it were true that the Appellant ". . . because of its compliance with the South Carolina Alcoholic Beverage Control

Laws . . . has exceeded the minimum requirements of Public Law 86-272 (which I have found not to be the case), nevertheless Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power." [App. B, *infra*, p. 21.]

Proceedings in the South Carolina Supreme Court and How the Federal Question is Presented

The Appellee, South Carolina Tax Commission, appealed the decision of the Court of Common Pleas to the South Carolina Supreme Court. In that Court, Appellee argued that "[a]ny person choosing to import alcoholic liquors into South Carolina in accordance with the Alcoholic Beverage Control Act is subject to State income taxation because the Alcoholic Beverage Control Act anticipates and requires that all persons importing liquor into South Carolina become residents of South Carolina and make deliveries of alcoholic liquors within South Carolina, thereby submitting to the State's complete jurisdiction to regulate and tax. . . . It is the legislative intent to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 9, 10.]

Appellant, Heublein, again took the position that the South Carolina Alcoholic Beverage Control Laws could not be applied so as to subject Heublein to South Carolina income taxes in view of Public Law 86-272. As it argued below [Brief of Heublein in the Supreme Court of South Carolina, pp. 9-10] the imposition of an income tax upon Heublein under the facts of this case ". . . is a burden on interstate commerce which exceeds the burden which is permitted with respect to alcoholic beverages by the 21st Amendment . . . and runs afoul of the express language and purpose of Public Law 86-272."

Thus the Federal question was presented: Whether the South Carolina Alcoholic Beverage Control Laws, as applied, were valid so as to cause Heublein to be subjected to South Carolina income taxes against Heublein's contention that it was not responsible for these taxes by virtue of the Federal Law. The South Carolina Supreme Court resolved this controversy in favor of the applicability of the income taxes to Heublein. It ruled that solely because of Heublein's compliance with South Carolina law the sales of Heublein's products in South Carolina ". . . were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." App. A, *infra*, p. 19.

THE QUESTIONS ARE SUBSTANTIAL

The opinion of the Supreme Court of South Carolina being appealed from holds that South Carolina may force non-resident producers of alcoholic beverages to perform certain rituals within the state which, without affecting the substance of their activities within the state, nevertheless deprive them of the applicability of Public Law 86-272 and subject them to state income taxes.

The decision of the South Carolina Supreme Court on this point conflicts directly with the decision of the highest court of Oklahoma in *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.*, 420 P. (2d) 894 (Okla. 1966), and marks the first time it has been held that the provisions of Public Law 86-272 may be so easily circumvented. Serious questions of the interpretation of a federal statute and of the power of Congress under the Commerce clause are thereby raised.

I. South Carolina cannot, by merely requiring the formalities of registration and appointment of a representative, nullify a Federal Statute which otherwise

concededly protects the activities in question from State income taxation.

South Carolina's statutory scheme is concededly designed to augment the State's revenues. [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.] The findings of the trial court make it abundantly clear that the changes wrought by the State's Alcoholic Beverages Control Act in Appellant's mode of doing business are purely formal [Tr., pp. 47-48]. The question is whether a technique of imposing such formalities, in order to subject Appellant to income taxation in spite of Public Law 86-272, will be successful.

Facts very similar to those here presented underlay *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp., supra.* The distillers there had likewise confined their voluntary business activities in Oklahoma to areas found to be clearly protected by Public Law 86-272. Oklahoma tax authorities argued that compliance with Oklahoma Alcoholic Beverage regulations, grounded in the Twenty-first Amendment, prevented the distillers from invoking the protection of the Federal Statute. The Court rejected the argument: "The [Oklahoma Tax Commissioner's] reliance on the 21st Amendment is misplaced. No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." (At 898.)

The same result is clearly required in the instant case. South Carolina is here exacting revenue, not imposing regulation. The legislative intent was "to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.]

Moreover, the decision of the Supreme Court of South Carolina, while discussing the proposition, with which Appellant does not quarrel, that a state may regulate the sale

of alcoholic beverages under the Twenty-first Amendment, really turns on its characterization of Appellant's business as "intrastate". This characterization is the court's sole reason for subjecting Appellant to this taxation. [App. A, at p. 19.] But it is anomalous indeed that South Carolina should interpret the word "intrastate", for purposes of determining the applicability of Public Law 86-272, so as to completely frustrate the purpose of that Statute.

There can be no doubt that the purpose of Public Law 86-272 is to free commerce which is in fact interstate from the burden of complying with myriad, diverse, inconsistent overlapping and onerous state income taxes. [S. Rep. No. 658, 86th Cong., 1st Sess. 2-5 (1959)]. Congress was particularly concerned with the high cost of compliance with the different state tax laws, and the possibility of double taxation. Central also to the Committee's report was the dependence of the tax liability upon each State's own, and divergent, constructions of such terms as "sale". [S. Rep. No. 658, 86th Cong., 1st Sess. 3 (1959)] There is no reason to suppose Congress really intended Public Law 86-272 to have the sole effect of shifting the emphasis from the ways the individual states defined "sale" to the ways they might choose to define "intrastate". Congress clearly wished to avoid the burdens on interstate commerce of non-uniform state income taxation of businesses in fact interstate. This result is not achieved if the states can, through their own interpretations of Public Law 86-272, reassert their individual power to levy diverse income taxes on a large segment of interstate commerce.

The issue involved in this case has ramifications far beyond Heublein and the State of South Carolina. If South Carolina is successful here, not only will the other distillers selling in the state, 71 at last count, be subjected in quick order to this tax, but every other state in the Union which feels the need for additional revenue will be tempted to

enact legislation requiring the simple formalities which will have been proven so effective in extending state taxing power. Georgia, for example, has regulations similar to South Carolina's Alcoholic Beverage Control Laws. It has evinced an interest in asserting its taxing power on substantially the same ground relied upon by Appellee.[3] There is every reason to believe that many states, in their ever-increasing search for additional revenue, will in fact adopt the South Carolina approach and subject all producers of alcoholic beverages to state income taxes.

Indeed, it may be a forlorn hope to suppose the technique here employed will be limited to the liquor industry. What is to prevent any state from using its police powers in any area of commerce to require a filing, or a registration, or appointment of an agent; anything in fact that its own courts could construe as "intrastate" and therefore "beyond the reach of Public Law 86-272"?

If South Carolina can successfully use its regulatory power to remove Appellant from the protection of Public Law 86-272, it is open for any other state to do the same. The federal statute thus becomes no more than a temporary impediment to the collection of revenue from firms

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[3] Letter addressed to counsel for the Appellant dated December 16, 1971, from Stuart S. Opotowsky, General Tax Counsel of Norton Simon Inc.

Norton Simon Inc. is the parent corporation of Somerset Importers, Ltd., distributors of Johnnie Walker scotch and other alcoholic beverages. The State of Georgia has attempted to tax us on the same grounds that the State of South Carolina used in the *Heublein* case.

The State of Georgia in August, 1971, proposed a deficiency assessment against Somerset Importers for the years ended June 30, 1968, 1969 and 1970. Somerset had not paid Georgia income taxes. It does not maintain its office, warehouse or stock of goods or any other property in Georgia. Sales orders are accepted in New York and deliveries are made by common carrier shipped from outside the State of Georgia to our customers within Georgia consigned to our registered representative in Georgia in accordance with the requirements of Georgia law. We have protested the proposed deficiency and are awaiting a hearing at the lowest administrative level.

engaged in interstate commerce, to be overcome by the inventiveness of the state taxing authorities.

What had been settled after the highest court in Oklahoma had rendered its opinion in *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp., supra,* has now become disturbingly unsettled. It would be to everyone's advantage to have this Court resolve as soon as possible the uncertainty created by the South Carolina Supreme Court's opinion.

If the conflict between the Oklahoma Supreme Court and the South Carolina Supreme Court were resolved in favor of the view expressed by the South Carolina Supreme Court certainly every state may subject all commerce in alcoholic beverages, and very likely many other commodities, to its local income taxation thus returning the alcoholic beverage industry, and probably many others as well, to the chaotic state of affairs which gave birth to Public Law 86-272.

At best, this would set off the next round of Congressional and State legislative activity, followed by judicial interpretation. But worse, it may mean that Congress has been effectively prevented from dealing with the problem at all. An interpretation of Public Law 86-272 permitting this result cannot be correct.

II. The Twenty-first Amendment does not prevent Federal regulation of the income taxation of Interstate Commerce in alcoholic beverages.

It is beyond the point of argument that the Twenty-first Amendment did not repeal the Commerce Clause with respect to alcoholic beverages:

> [The Conclusion] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplifi-

cation. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a contention would be patently bizarre and is demonstrably incorrect. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331-332, 84 S. Ct. 1293, 1298 (1964).

And, of course, Congress has a long history of regulating interstate commerce, including the liquor industry, where national policy so required, *e. g.*, Federal Alcohol Administration Act, 27 U. S. C. § 201 *et seq.;* The National Labor Relations Act, 29 U. S. C. § 151 *et seq.;* The Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.;* 18 U. S. C. § 659, relating to thefts from interstate shipments, and many more. Appellee cannot seriously propose that all the Acts of Congress, relating to interstate commerce, are inapplicable to Appellant because of its compliance with South Carolina's Alcoholic Beverage Control Laws. South Carolina would have us believe that it can eliminate interstate commerce in alcoholic beverages for purposes of federal legislation by judicial interpretation. If this be true then Congress would be powerless to enact any legislation effecting traffic in alcoholic beverages in South Carolina and in any other state which adopted the South Carolina approach.

States have the power to regulate traffic in alcoholic beverages within their borders but in this instance the State of South Carolina is not seeking to regulate alcoholic beverage traffic—it is seeking to place an **income tax** on this traffic. On the other hand Congress, by means of Public Law 86-272, is attempting to mitigate the income tax burdens interstate commerce, including interstate commerce in alcoholic beverages, must bear as a result of the wide variety of income tax provisions spawned by the

many taxing jurisdictions contained in our Federal system. The incompatibility of the two positions is apparent.

The authority for the Federal position is found in the Commerce Clause. The authority cited by the South Carolina Tax Commission, which they claim gives them the right to denominate Appellant's activities as "intrastate" for income tax purposes, is the Twenty-first Amendment. Cases decided by this court, upholding state regulation of alcoholic beverages, *e. g., Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128 (1939), relied upon by Appellee below, are not in point. We are not here concerned with the validity of state police regulation of liquor traffic, but with the propriety of refusing Appellant protection from state income taxation under Public Law 86-272. The object is not to find a name for what Appellant does, but to determine if the purpose of Public Law 86-272 requires its application to Appellant. Since the purpose of achieving uniformity, discussed above, most certainly does warrant the application of the Statute to Appellant, and no state interest protected by the Twenty-first Amendment argues against such an application, Public Law 86-272 ought to be applied.

III. **What the State requires as a minimum to effectuate delivery of products within that State should be within the minimum protected by Public Law 86-272.**

Heublein argued in the Court of Common Pleas and in the Supreme Court of South Carolina that since it had done the very minimum it could under South Carolina law this state-imposed minimum should come within the activities protected by Public Law 86-272. This argument was successful in the Court of Common Pleas but was rejected by the South Carolina Supreme Court. Appellant would wish to reserve this point for argument before this Court.

IV. Notwithstanding the State imposed delivery procedure Heublein is not responsible for State income taxes by virtue of Public Law 86-272 if its products are "shipped" from a point without the State.

Heublein would wish to reserve for argument in this Court the point argued below that if the other requirements of Public Law 86-272 are met a nonresident is not liable for state income taxes if "shipment or delivery" is from a point without the state. Because the Federal law requirements are framed in the alternative if in this instance the state-imposed method of delivery is found to be sufficient to justify imposition of state income taxes the question remains as to whether or not Appellant can escape payment of these taxes by reliance on its out-of-state "shipment." There is no question but that the goods were shipped from Hartford, Connecticut, to the wholesaler's warehouse in Columbia, South Carolina (certainly not from Heublein in the wholesaler's warehouse to the wholesaler in the same building). Admittedly formal title was still with Appellant in Columbia, South Carolina, until the title documents were cleared by its representative through the South Carolina Tax Commission, but the whole purpose of Public Law 86-272 was to avoid consideration of the technical formalities as to where title might pass [S. Rep. No. 658, 86th Cong., 1st Sess. 3-4 (1959)] and instead to focus the examination on the tests set forth in the Federal law. If this be done then "shipment" is most certainly from a point without South Carolina, and it makes no difference whether "delivery" is or is not from a point without the state—Appellant is within the minimum requirement of Public Law 86-272 and therefore not liable for South Carolina income taxes.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

W. Croft Jennings, Jr.,
Attorney for Appellant,
Heublein, Inc.

INDEX TO APPENDIX

APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

HEUBLEIN, INC., RESPONDENT,

v.

SOUTH CAROLINA TAX COMMISSION, APPELLANT

APPEAL FROM RICHLAND COUNTY

JOHN GRIMBALL, JUDGE

Opinion No. 19289

Filed September 22, 1971

REVERSED AND REMANDED

Attorney General Daniel R. McLeod and Assistant Attorneys General Joe L. Allen, Jr., and G. Lewis Argoe, Jr., all of Columbia, for appellant.

Carlisle Roberts and W. Croft Jennings, Jr., both of Roberts, Jennings & Thomas, of Columbia, for respondent.

LEWIS, A. J.: The question to be decided is whether respondent, Heublein, Inc., a Connecticut corporation, is liable to the State of South Carolina for income and license taxes assessed on the basis of Heublein's sales of alcoholic beverages in the State for the years 1964-68. The taxes were assessed by the appellant, South Carolina Tax Commission, paid under protest, and this action brought by Heublein to recover the taxes so paid. The lower court, in accord with Heublein's contention, held that Heublein was exempt from the payment of income and license taxes to South Carolina by virtue of the provisions of an Act of Congress, referred to as Public Law 86-272, the pertinent portion found in 15 U.S.C.A. Section 381.

Heublein's claim of exemption from taxation in South Carolina is based solely on the provisions of the foregoing Federal statute. Under its pertinent provisions, Congress enacted that no State shall have power to impose a net income tax on income derived within the State from interstate commerce, if the only business activity within the State was solicitation of orders for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State.

Under the powers reserved to the State by the Twenty-first Amendment, South Carolina has adopted its Alcoholic Beverage Control Act which prescribes the conditions under which alcoholic liquors may be imported into the State. Sections 4-131 to 4-150, 1962 Code of Laws. This statute requires that a producer of alcoholic beverages, before shipping liquor into South Carolina, must be registered with the State and that such producer appoint a "producer-representative" who shall be a resident of the State. It is further provided that shipment of alcoholic liquors into the State must be made to the "registered representative" of the producer who must accept delivery of the liquors within the geographical limits of South Carolina. Thereafter, the producer, through his representative, is authorized to make delivery of the alcoholic liquors from within South Carolina to a licensed wholesaler in the State. The "producer-representative" then certifies as to such delivery to the appellant Tax Commission.

All shipments of liquors into South Carolina for sale must be made to the shippers own representative within the State. Delivery is then made intrastate to the purchaser and such sale can be made in no other way. These statutory provisions preclude the sale of alcoholic liquors in South Carolina through interstate sales. Such constitutes a valid exercise of the State's powers under the Twenty-first Amendment. *State v. Kilgore,* 233 S. C. 6, 103 S. E. (2d) 321, citing *Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128; *State Board of Equalization of California v. Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38.

Public Law 86-272 is applicable when delivery is made from a point outside the State and is inapplicable to sales and delivery consummated within the State.

It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272.

The taxes here in question were properly assessed against Heublein. The judgment of the lower court is accordingly reversed and the cause remanded for entry of judgment in favor of the appellant, South Carolina Tax Commission.

MOSS, C.J., BUSSEY, BRAILSFORD, and LITTLEJOHN, JJ., concur.

APPENDIX B

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

HEUBLEIN, INC., PLAINTIFF,

v.

SOUTH CAROLINA TAX COMMISSION, DEFENDANT

IN THE COURT OF COMMON PLEAS

ORDER

At issue in this case is the South Carolina income and license tax liability of Heublein, Inc. for the years ending June 30, 1964 through 1968, inclusive. On or about January 2, 1969, the South Carolina Tax Commission ruled that Heublein, Inc. was responsible for these taxes. On February 1, 1969, Heublein paid these taxes, amounting to $21,549.30, including interest, and brought timely suit to recover same. This case was heard by me on July 28, 1970, and thereafter briefs were submitted by both parties.

The defendant, the South Carolina Tax Commission, is a department of the government of the State of South Carolina. The plaintiff, Heublein, Inc., is a Connecticut corporation with its principal office in Hartford, Connecti-

cut. It manufactures alcoholic beverages which are sold throughout the United States, including South Carolina.

Heublein challenged the assessments on the ground that it was not liable for the taxes by virtue of Public Law 86-272[1].

In 1958, South Carolina enacted legislation, appearing as Article VII of the Alcoholic Beverage Control Act, §§ 4-131 to 4-150 of the South Carolina Code of Laws, 1962. This statute requires, among other things, that a person shipping alcoholic liquors into South Carolina shall register with the Commission as a "registered producer" and appoint a "producer-representative." Each time alcoholic liquors are shipped from without the State into South Carolina, they must be consigned to the registered producer in care of the producer-representative, who is required to deliver the goods to the purchaser after obtaining from the Commission permission for transfer. The shipper is required to mail to the Commission and the producer-representative a copy of the invoice covering the shipment. The producer-representative certifies as to delivery on the invoice copy sent to him and mails it to the Commission.

During the years in question, Heublein had one employee in South Carolina, a Mr. Billy J. Belch, who resided in Columbbia and was a full-time employee. The Ben Arnold Company, Inc. of Columbia was the wholesaler who acted as the distributor of Heublein products in South Carolina. In South Carolina, Heublein has no office, no

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[1] 15 U. S. C. § 381. *Imposition of net income tax—Minimum standards.*

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State, for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and,

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The act continues, but it is sufficient for the purpose of this Order to restrict ourselves to the above quoted portion.

warehouse, no telephone listing, no automobile, and no mailing address. Mr. Belch had an office in his home. Mr. Belch worked to further sales of Heublein's products in South Carolina in two ways. He would brief the salesmen of the Ben Arnold Company, to better inform them and to let them know something of the history of the Heublein products. He would also call upon Ben Arnold's retail accounts, tell them about Heublein products, and leave promotional materials with them. Mr. Belch had a sample allowance of about $40 a month which he used for personal consumption and for entertainment. Occasionally, when on the road, Mr. Belch would pick up an order for Heublein's products from a retailer and, as an accommodation, deliver it to the Ben Arnold Company. Orders for Heublein products would be placed by the wholesaler, the Ben Arnold Company, with Heublein's home office in Hartford, Connecticut. When the order was accepted, an acknowledgment would be sent from Heublein to the Ben Arnold Company and Heublein would indicate when the order would be shipped. In Hartford, the goods ordered would then be prepared for shipment and South Carolina Alcoholic Beverage Stamps, supplied by the Ben Arnold Company, would be affixed. When shipped, these items moved by common carrier, F.O.B. Hartford, Connecticut, consigned to Heublein in care of Mr. Belch at the premises of the Ben Arnold Company. Ben Arnold made payment to Heublein for the orders by sending checks to a lock box in Atlanta, Georgia.

The statute and the regulations issued by the Tax Commission implementing the above act provide that upon arrival in South Carolina and upon completion of delivery to the producer-representative, the alcoholic beverages must either (1) be stored in a licensed warehouse of the registered producer or (2) be turned over to a wholesaler, pursuant to a Certificate of Transfer applied for by the producer-representative and approved by the Tax Commission. Heublein maintained no warehouse in South Carolina, hence all shipments into the state were turned over to the wholesaler in response to whose order the shipment was made. In practice, shipments of alcoholic beverages into South Carolina were delivered by the common car-

rier to Heublein's producer-representative at the wholesaler's address. Heublein, in compliance with the regulations prescribed and upon the forms prescribed, sent copies of the invoice and of the bill of lading to the Alcoholic Beverage Control Commission and to Mr. Belch. Upon arrival of the shipment by common carrier at the wholesaler's address, consigned to Heublein in care of Mr. Belch, Mr. Belch turned the shipment over to the wholesaler pursuant to the Certificate of Transfer obtained from the Alcoholic Beverage Control Commission in the manner previously indicated. Mr. Belch also furnished the Alcoholic Beverage Control Commission a copy of the invoice, with an endorsement thereon showing the date and place delivery was accepted. To facilitate the paper work involved in complying with the mechanics of the statute, the producer-representative was given desk space at the Ben Arnold Company, and for this desk space Heublein paid no rent.

Prior to the passage of the 1958 South Carolina legislation, Heublein did not engage in any of the activities specifically required by this legislation.

Heublein maintains that Public Law 86-272 is controlling. This act was passed as the reaction of Congress to the United States Supreme Court decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450, 79 S. Ct. 357 (1959). In this case, the Supreme Court was asked to decide whether certain activities of the taxpayers, corporations engaged in interstate commerce, were sufficient to provide a nexus with the state so that there might be an income tax levied on the corporations as a result of such activity. The Supreme Court, in answering this question, provided broad, general language to the effect that if the income tax was "not discriminatory and is properly apportioned to local activities within the taxing State," the state may subject the corporation to a state income tax.

This decision caused a great deal of consternation among the firms engaged in interstate commerce. Senator Harry Byrd of Virginia, Chairman of the Senate Finance Committee, in the Committee Report on what became Public Law 86-272, gave reasons for the concern. The Report

pointed out that there were (at that time) at least thirty-five states, the District of Columbia, and some eight cities which taxed business income, including earnings derived from interstate commerce, where there was some local business activity. Of all these taxing entities, no two had the same apportionment formula and all had widely varying definitions of the word "sale." It was apparent that unless some uniformity were introduced into the field of state taxation of interstate commerce, many businesses, particularly small or medium size ones, would be reluctant to expand their operations, and the implications for the national economy might well be unfortunate. In accordance with the need envisioned by the Senate Finance Committee, the Interstate Income Tax Law, Public Law 86-272, was enacted to provide uniformity and certainty in the area of state taxation of net income derived from interstate commerce. This act, which was approved September 14, 1959, provides that a state may not impose an income tax on income derived within that state from interstate commerce if the only business activity within the state does not exceed certain minimum standards. In essence, these minimum standards are (1) solicitation of orders within the state which (2) are sent outside the state for approval or rejection and, (3) if approved, are filled by shipment or delivery from a point outside the state. Heublein points out the Public Law 86-272 does not adopt the criterion of "sale," but rather the more specific criterion of sending of orders out of the state for acceptance, and shipment or delivery from a point outside the state.

Public Law 86-272 was held to be constitutional in *Smith, Kline & French Lab. v. State Tax Comm'n.*, 403 P. (2d) 374 (Ore. 1965); *State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n.*, 382 S. W. (2d) 645 (Mo. 1964); and *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. (2d) 314 (1964), *cert. denied* 379 U. S. 902 (1964).

Heublein maintains that all of its activities within South Carolina come within the minimum activities allowable by Public Law 86-272. Heublein's activities fall into two categories: first, the activities which Heublein does of its own volition and, second, the activities which Heublein

only because it is required to do so by the South Carolina liquor laws. Setting aside for the moment these activities which Heublein does as a result of state compulsion, I am of the opinion and so find that all other activities of Heublein come within the minimum allowable by Public Law 86-272. These activities engaged in by Heublein are very similar to the activities which have been previously considered by courts and found to be acceptable as within the minimum permitted by Public Law 86-272. *See, e.g., Smith, Kline & French Lab. v. State Tax Comm'n., supra;* and, *State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n., supra.*

I now turn to a consideration of whether the activities which Heublein was forced to do by the reason of the South Carolina Alcoholic Beverage Control Laws are sufficient to cause Heublein to come without the protection of Public Law 86-272. In this instance, Heublein is compelled by the State to follow a specific statutory procedure in making delivery from without the State to the wholesaler-purchaser within the State. The state may prescribe the delivery procedure, but compliance with such requirements cannot deprive Heublein of the effectiveness or applicability of the federal law on this subject. Such state-imposed minimum requirements therefore come within the minimum activities protected by Public Law 86-272. To hold otherwise would set the various taxing authorities free to devise all manner of restrictive regulations so that they might avoid the effect of Public Law 86-272.

Accordingly, I find and hold that Heublein did not exceed the minimum activities permitted by Public Law 86-272, and therefore Heublein is not liable for South Carolina income or license taxes.[2]

Heublein has also maintained, and I think correctly, that even if it were decided that because of its compliance with the South Carolina Alcoholic Beverage Control Laws Heublein has exceeded the minimum requirements of Public Law 86-272 (which I have found not to be the case), nevertheless Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not

[2] The license tax must fall since it is predicated on liability for income tax.

be extended under the guise of the exercise of its police power.

The State's power under the twenty-first amendment to the United States Constitution is to regulate the liquor traffic. This power is not challenged by Heublein. However, the police power and the power to tax are two separate and distinct powers. This point was made quite clear in *Oklahoma Tax Comm'n. v. Brown-Forman Distillers Corp.*, 420 P. (2d) 894 (Okla. 1966). There is no substantial difference in the position taken by the Oklahoma Tax Commission in *Brown-Forman* (that simply because a corporation deals in alcoholic beverages the state can impose an income tax) and the position taken by the South Carolina Tax Commission in this case (that because a corporation deals in alcoholic beverages the state can make it do certain things and when it does those things the state can then subject it to an income tax). Neither the state nor its tax authorities may use the state's police power over the liquor traffic so as to subject a foreign corporation to a state income tax in circumstances where it would not otherwise be liable. Such would be a patent abuse of the state's police power.

I hold that following the regulations legally prescribed by the State for importing alcoholic beverages from without the State is but a step in the "shipment or delivery" of the goods referred to in Public Law 86-272; but, if such compliance be regarded as performance by Heublein of acts beyond the minimum requirements set up by Public Law 86-272, such acts are done under compulsion and cannot be invoked to subject Heublein to an income tax from which it otherwise is protected by the Act of Congress.

Accordingly, the Court hereby certifies of record, in accordance with § 65-2662, South Carolina Code of Laws, 1962, that taxes in the amount of $21,549.30 have been wrongfully collected from Heublein, Inc. by the South Carolina Tax Commission and ought to be refunded, to-

gether with interest at the legal rate from February 1, 1969.

And it is so Ordered.

JOHN GRIMBALL,
Resident Judge,
Fifth Judicial Circuit.

Columbia, South Carolina,
February 18, 1971.

APPENDIX C

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

BEFORE THE SOUTH CAROLINA TAX COMMISSION

IN RE:

Heublein, Inc., a finding of whether the South Carolina Income of the corporation is excluded from taxation by Public Law 86-272, now codified as 15 U. S. C. A. 381, *et seq.*

The corporation, a "registered producer" as defined by Article 7, Chapter 1, Title 4 of the Code of Laws of South Carolina, has a resident registered representative and has likewise registered the brands of its products that are sold in South Carolina. The corporation sells alcoholic beverages to licensed wholesalers and the taxation of the income from such business is the subject involved herein.

The Corporation Income Tax Division has assessed a tax on such income and the corporation appears before us today in protest of the assessment, contending that the income is not subject to taxation because of Public Law 86-272. That law sets up certain activities that the corporation may do and not be subject to taxation; however, Article 7, Chapter 1, Title 4, requires the corporation, in order to legally sell its products to the wholesalers, to engage in activities in South Carolina that exceed the minimum as provided for by Public Law 86-272. The corporation, however, contends that the South Carolina statutes are regulatory and in no way affect the taxability of the income. The provisions of the Article were a part of the

general laws of the State prior to the enactment by the Federal Congress of Public Law 86-272. The corporation does not dispute the fact that it complies in every way with the requirements of the Article and thus engages in a legal business that would otherwise be illegal or prohibited.

Under such circumstances, the corporation's activities in South Carolina exceed the minimum requirements of Public Law 86-272 and the income therefore is taxable.

SOUTH CAROLINA TAX
COMMISSION,

/s/ROBERT C. WASSON,
Chairman.

Columbia, South Carolina,
January 2, 1969.

APPENDIX D

ART. I, § 8 CONSTITUTION OF THE UNITED STATES

§ 8. Powers of Congress.

The Congress shall have power . . .

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

• • •

APPENDIX E

Constitution of the United States

ARTICLE XXI.

§ 1. National liquor prohibition repealed.

The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. Transportation of liquor into "dry" state.

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. Ratification within seven years.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

• • •

APPENDIX F

15 U. S. C. § 381. Imposition of net income tax—Minimum Standards

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

Domestic corporations; persons domiciled in or residents of a State

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to— .

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Sales or solicitation of orders for sales by independent contractors

(c) For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

Definitions

(d) For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Pub. L. 86-272, Title I, § 101, Sept. 14, 1959, 73 Stat. 555.

§ 382. Assessment of net income taxes; limitation; collection

(a) No State, or political subdivision thereof, shall have power to assess, after September 14, 1959, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending

on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 381 of this title.

(b) The provisions of subsection (a) of this section shall not be construed—

(1) to invalidate the collection, on or before September 14, 1959, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after September 14, 1959, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

§ 383. Definition

For purposes of this chapter, the term "net income tax" means any tax imposed on, or measured by, net income.

§ 384. Separability provision

If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

• • •

APPENDIX G

1

South Carolina Code of Laws (1962)

ARTICLE 7. *Importation of Alcoholic Beverages.*

§ 4-131. Definitions.—(1) The word *"producer"* as used in this chapter shall mean a manufacturer, distiller, rectifier, blender, or bottler of alcoholic liquors and shall include an importer of alcoholic liquors engaged in importing such alcoholic liquors into the United States.

(2) *"Registered producer"* shall mean a producer as herein defined who is registered with the South Carolina Tax Commission pursuant to this article.

(3) *"Producer representative"* shall mean a person who is a bona fide citizen of South Carolina and who maintains his principal place of abode in this State and who is registered with the South Carolina Tax Commission pursuant to this article as the South Carolina representative of a registered producer. (1958 (50) 1721.)

§ 4-132. **Application of article.**—The provisions of this article shall be applicable notwithstanding any other provision of law. (1958 (50) 1721.)

§ 4-133. **Licensed manufacturers exempt.**—Any manufacturer licensed under the provisions of this chapter shall be exempt from the provisions of this article. (1958 (50) 1721.)

§ 4-134. **Only registered producers may import liquors.**—No person other than a registered producer shall ship or move, or cause to be shipped or moved, any alcoholic liquors from a point outside South Carolina to a point within the geographic limits of South Carolina, and then only in accordance with the provisions of this article. (1958 (50) 1721.)

§ 4-135. **Only registered brands may be imported.**—No alcoholic liquors shall be shipped or moved into South Carolina unless and until each brand of such alcoholic liquors is duly registered with the South Carolina Tax Commission in accordance with the provisions of this article and regulations of the Tax Commission promulgated thereunder. (1958 (50) 1721.)

§ 4-136. **Registration of producers; applications; fees; term.**—Every producer shall apply to the Tax Commission on such forms as the Tax Commission may prescribe, for a certificate of registration, which certificate must be approved and issued prior to the shipment of any alcoholic liquors by the producer to a point within the geographic limits of South Carolina.

Every producer, at the same time application is made for a certificate of registration, shall remit to the Tax Commission a fee of one hundred dollars. Where a certificate is

applied for on or after January 1st, the fee shall be fifty dollars.

Every certificate of registration shall be valid from the date of issue until June 30, next succeeding. (1958 (50) 1721.)

§ 4-137. Registration of brands; applications; fee; term.—Every registered producer shall, prior to the shipment of any alcoholic liquors to a point within the geographic limits of South Carolina, obtain from the Tax Commission a certificate of registration for each and every brand of alcoholic liquors intended to be shipped to a point within the geographic limits of this State. The Tax Commission shall provide appropriate forms for application for certificate of registration of brands of alcoholic liquors.

At the same time that application for a certificate of registration of brands of alcoholic liquors is submitted, a fee of ten dollars shall be paid to the Tax Commission for each and every brand except the first five brands of a registered producer.

A certificate of registration of brands of alcoholic liquors shall be valid from the date of issue to June 30, next succeeding. (1958) (50) 1721.)

§ 4-138. Registration of producer representatives; applications; fee.—No person shall be qualified as a producer representative unless and until he has made application to the Tax Commission for a certificate of registration and such certificate shall have been approved and issued. The Tax Commission shall provide appropriate forms of application for a certificate of registration as a producer representative.

At the same time the application for a certificate of registration as a producer representative is submitted, a fee of twenty-five dollars shall be paid to the Tax Commission. (1958 (50) 1721.)

§ 4-139. Persons disqualified to be producer representatives.—No person having a direct or indirect interest in a wholesale or retail liquor business in South Carolina may qualify as a producer representative. (1958 (50) 1721.)

§ 4-140. Licensing of producers' warehouses; applications; fees; term.—A registered producer may store alcoholic liquors only in warehouse of such registered producer duly licensed by the Tax Commission. The Tax Commission shall require sufficient bond with respect to a licensed warehouse to insure proper handling of liquors stored therein. Section 4-9 shall be inapplicable with respect to warehouses licensed under the provisions of this article. Application for license to operate a warehouse shall be filed on such forms as the Tax Commission may prescribe.

At the same time application for a warehouse license is submitted, a fee of two hundred dollars shall be paid to the Tax Commission. Where application is made for a warehouse license on or after January 1st, the fee shall be one hundred dollars.

A warehouse license shall be valid from the date of issue until June 30, next succeeding. (1958) (50) 1721.)

§ 4-141. How shipments made; certificates of approval required.—Alcoholic liquors shall be shipped or moved from a point without South Carolina to a point within the geographic limits of South Carolina only by railroad companies, steamship companies, express companies, or truck companies, authorized to do business in South Carolina as common carriers by the South Carolina Public Service Commission. Such alcoholic liquors shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property of the registered producer originating the shipment. The shipment of alcoholic liquors shall be either stored in a duly licensed warehouse of the registered producer or, after delivery to the producer's representative is complete, may then be shipped by common carriers aforementioned, to a duly licensed wholesaler. Shipments of alcoholic liquors from a licensed producer's warehouse to a licensed South Carolina wholesaler may be made in a vehicle owned and operated by the wholesaler. Should alcoholic liquors be stored in the warehouse of a registered producer, or after delivery to the producer's representative is complete, they may be shipped to a duly licensed wholesaler or to a point

without South Carolina. Prior to any such shipment or transfer, the producer's representative shall apply to the Tax Commission, on forms prescribed by the Tax Commission, for permission to ship or transfer such alcoholic liquors, and the producer's representative shall have received a certificate of approval of such shipment or transfer. (1958 (50) 1721.)

§ 4-142. **Producers importing to send Commission invoices and bills of lading; representatives to acknowledge delivery.**—Prior to shipment into the geographic boundaries of South Carolina, the registered producer shall mail to the Tax Commission by first-class mail a correct and complete invoice, showing in detail the items in such shipment by quantity, type, brand, size, price, and the point of origin, and the point of destination. Also prior to or at the time of shipment, a copy of the bill of lading shall be forwarded to the Tax Commission by first-class mail. Immediately upon acceptance of delivery of the shipment by the producer's representative, the producer's representative shall furnish the Tax Commission with a copy of the invoice covering the shipment with endorsement thereon showing the date, time, and place delivery was accepted. (1958 (50) 1721.)

§ 4-143. **Producer representatives to send invoices on shipments and bills of lading on exports.**—Prior to shipment to any South Carolina wholesaler or to any point without the State of South Carolina, the producer's representative shall mail to the Tax Commission a correct and complete copy of the invoice covering the shipment, showing the name and address of the consignee and, in detail, the items in such shipment by quantity, type, brand, size, and price. On all shipments to a point without South Carolina, the producer's representative shall at the time of shipment mail to the Tax Commission a copy of the bill of lading. (1958 (50) 1721.)

§ 4-144. **Seizure and sale of liquor illegally shipped.**—Any alcoholic liquors shipped or moved into the geographic limits of South Carolina in violation of any provision of this article, are hereby declared contraband and may be seized and sold as provided by § 4-111.1. (1958 (50) 1721.)

§ 4-145. **Issuance or rejection of applications.**—The Tax Commission, in its discretion, upon due consideration of the information contained in applications for certificates and licenses provided for in this article, shall issue or reject the certificate or license applied for. (1958 (50) 1721.)

§ 4-146. **Suspension or revocation of registrations or licenses.**—Any and all certificates of registration or licenses provided by this article may be suspended or revoked by the Tax Commission upon a showing of any violation of law or of any regulation of the Tax Commission. (1958 (50) 1721.)

§ 4-147. **Applicants to certify right to examine records.**—In all cases the applicant for a certificate or license required by this article, as a condition precedent to the issue of such certificate or license, must certify that the Tax Commission shall have the right within statutory limitations to audit and examine the books and records, papers and memoranda of the applicant, with respect to the administration and enforcement of laws administered by the Tax Commission. (1958 (50) 1721.)

§ 4-148. **Enforcement of article.**—The Tax Commission shall administer and enforce the provisions of this article. (1958 (50) 1721.)

§ 4-149. **Rules and regulations.**—The Tax Commission shall have the power to make such rules and regulations not inconsistent with law deemed necessary for the proper administration and enforcement of this article. Such rules and regulations shall have the full force and effect of law. (1958 (50) 1721.)

§ 4-150. **Deposit of receipts.**—All moneys received by the Tax Commission under the provisions of this article shall be deposited with the State Treasurer to the credit of the general fund of the State. (1958 (50) 1721.)

APPENDIX G

2

South Carolina Code of Laws (1962) (as amended)

* * *

§ 4-137.1. Producers to file affirmation that brands will sold to State wholesalers in parity with lowest nationwide price schedule.—Every registered producer of alcoholic liquors shall, at the time of application for registration in this State, file with the Tax Commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such producer in this State. The affirmation shall certify that the producer shall not wilfully sell or offer for sale any alcoholic liquors of a particular brand and proof in any State in the United States at a price lower than the price such liquors are sold or offered for sale to licensed South Carolina wholesalers.

"Price" as used in this section shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violations of the producer's affirmation if such discount prices are also offered to South Carolina wholesalers for purchases in the same quantities.

Any registered producer who fails to file such affirmation or wilfully violates the pledges contained therein shall have its registration and privileges to import and sell alcoholic liquors in the State refused, cancelled or suspended at the discretion of the Tax Commission for such periods as the Commission may deem necessary and proper.

Any producer may appeal a judgment of the Tax Commission to the circuit court of Richland County. (1967 (55) 889.)

§ 4-140. Licensing of producers' warehouses; applications; fees; term.—A registered producer may store alcoholic liquors only in a warehouse of such registered producer duly licensed by the Tax Commission. The Tax

Commission shall require sufficient bond with respect to a licensed warehouse to insure proper handling of liquors stored therein. Application for license to operate a warehouse shall be filed on such forms as the Tax Commission may prescribe.

At the same time application for a warehouse license is submitted, a fee of two hundred dollars shall be paid to the Tax Commission. Where application is made for a warehouse license on or after January first, the fee shall be one hundred dollars.

A warehouse license shall be valid from the date of issue until June thirtieth, next succeeding. (1958 (50) 1721; 1967 (55) 562.)

• • •

§ 4-141. How shipments made; certificates of approval required.—Alcoholic liquors shall be shipped or moved from a point without South Carolina to a point within the geographic limits of South Carolina only by railroad companies, steamship companies, express companies, or truck companies, authorized to do business in South Carolina as common carriers by the South Carolina Public Service Commission or by wholesalers licensed by the South Carolina Tax Commission. Such alcoholic liquors shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property of the registered producer originating the shipment. The shipment of alcoholic liquors shall be either stored in a duly licensed warehouse of the registered producer or, after delivery to the producer's representative is complete, may then be shipped by common carriers aforementioned or by wholesalers licensed by the South Carolina Tax Commission, to a duly licensed wholesaler. Shipments of alcoholic liquors from a licensed producer's warehouse to a licensed South Carolina wholesaler may be made in a vehicle owned or operated by the wholesaler. Should alcoholic liquors be stored in the warehouse of a registered producer, or after delivery to the producer's representative is complete, they may be shipped to a duly licenced wholesaler or to a point without South Carolina. Prior to any such shipment or transfer, the producer's representative shall apply to the Tax Commission, on

forms prescribed by the Tax Commission, for permission to ship or transfer such alcoholic liquors, and the producer's representative shall have received a certificate of approval of such shipment or transfer. (1958 (50) 1721; 1963 (53) 488.)

• • •

APPENDIX H

1

§ 65-222. Tax on corporations.—Every corporation organized under the laws of this State, whose entire business is transacted or conducted within this State, shall make a return and shall pay annually an income tax equivalent to five per cent of the entire net income received by such corporation during the income tax year, and except as otherwise provided, every corporation organized under the laws of this State, doing or transacting business partly within and partly without this State, shall make a return and shall pay annually an income tax equivalent to five per cent of a proportion of its entire net income, to be determined as provided in this chapter, and except as otherwise provided, every foreign corporation transacting, conducting, doing business or having an income within the jurisdiction of this State, whether or not such corporation be engaged in or the income derived from intrastate, interstate, or foreign commerce, shall make a return and shall pay annually an income tax equivalent to five per cent of a proportion of its entire net income, to be determined as provided in this chapter. The terms "*transacting,*" "*conducting,*" or "*doing business,*" as used in this section shall include the engaging in or the transacting of any activity in this State for the purpose of financial profit or gain.

• • •

APPENDIX H

2

§ 65-602. Annual reports to be filed by corporations and cooperatives; exemption of cooperatives from tax.—Every corporation organized under the laws of South Caro-

lina to do business for profit and every corporation organized to do business under the laws of any other state, territory or country and qualified to do business in South Carolina and any other corporation required by § 65-222 to file income tax returns shall, in addition to any and all other requirements of law, make a report annually to the Tax Commission on or before the fifteenth day of the third month next after the preceding income year in such form as may be prescribed by the Tax Commission containing such information and facts as the Commission may require for the administration of the provisions of this chapter.

Cooperative organizations and corporations organized under chapters 14, 15 or 16 of Title 12 shall file reports required by this section, but shall be exempt from the tax levied in § 65-606.

• • •

APPENDIX H

3

§ 65-606. **License tax imposed on corporations generally; rate; when payable.**—In addition to any and all other license taxes or fees or taxes of whatever kind, every corporation required to file a report by § 65-602, except such corporations as are enumerated in § 65-608, shall pay to the Commission, at the time of filing the report required by § 65-602, an annual license fee of one mill upon each dollar paid to the capital stock and paid in as surplus of said corporation as shown by the records of the corporation on the first day of the income year next preceding the date of filing the report. In no case shall the license fee provided for this section be less than ten dollars. The license fee provided for by this section shall be paid at the time of filing the report pursuant to the provisions of § 65-602, on or before the fifteenth day of the third month next after the preceding income year.

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APPENDIX I

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Opinion No. 19289

HEUBLEIN, INC.,

v.

SOUTH CAROLINA TAX COMMISSION

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Heublein, Inc. hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Carolina, which held that Heublein, Inc. was responsible for State of South Carolina income taxes, entered in this action on September 22, 1971, Petition for Rehearing denied October 11, 1971.

This appeal is taken pursuant to 28 U. S. C. § 1257 (2).

W. Croft Jennings, Jr.,
Counsel for Heublein, Inc.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing notice of appeal has been mailed to the Honorable Daniel R. McLeod, Attorney General of the State of South Carolina, at Post Office Box 11549, and Joe L. Allen, Jr. Esquire and G. Lewis Argoe, Jr., Esquire, Assistant Attorneys General, at Post Office Box 125, Columbia, South Carolina 29202, this 30th day of December, 1971. I further certify that all parties required to be served have been served.

W. Croft Jennings, Jr.,
Counsel for Heublein, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE DISTILLED SPIRITS INSTITUTE AS AMICUS CURIAE

STEPHEN M. PIGA,
14 Wall Street,
New York, New York 10005.

Of Counsel:

WHITE & CASE.

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I. Interest of Amicus Curiae

This brief is submitted, with the written consent of both parties, by the Distilled Spirits Institute in support of the Jurisdictional Statement of the Appellant. The Distilled Spirits Institute is a trade association having its principal office at 1132 Pennsylvania Building, Washington, D. C. 20004. It counts among its members most of the manufacturers of distilled spirits in the United States.

This case involves the interpretation of Public Law 86-272 (The Interstate Income Tax Act; 15 U.S.C. §381; Jurisdictional Statement, A. 30-32) which prohibits the imposition of state income taxes on interstate commerce conducted by businesses which limit their business activities in the taxing state to those covered by the statute.

The Supreme Court of South Carolina has in this case held that the taxpayer, Heublein, by virtue of its compliance with South Carolina's Alcoholic Beverage Control Laws, has been placed outside the protection of the Federal statute.

States have, under the Twenty-first Amendment, the power to regulate traffic in alcoholic beverages within their borders. The claim that the states could legitimately use this regulatory power to extend their taxing power over interstate commerce in spite of Public Law 86-272 was rejected in *Oklahoma Tax Comm'n* v. *Brown-Forman Distillers Corp.*, 420 P. 2d 894 (Okla. 1966). The Supreme Court of South Carolina, by its decision from which this appeal is taken, threatens to resuscitate this claim.

In 1970, 212,257,376 tax gallons of distilled spirits were produced in the United States.* The Institute estimates that the bulk of this production is sold in interstate commerce**, and that Institute members account for the greater proportion of such commerce.***

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* Distilled Spirits Industry 1970 Annual Statistical Review p. 8.

** 99% of whiskey production, for example, occurs in six states, which, however, account for only about 18% of distilled spirits consumption (based on figures taken from Distilled Spirits Industry 1970 Annual Statistical Review).

*** In South Carolina, for example, 1,754,562 cases of distilled spirits were shipped to wholesalers. Of these, 1,259,748 cases, or 71.8%, were shipped by Institute firms.

Consequently, resolution of the direct conflict between the highest courts of Oklahoma and South Carolina is of vital interest to the Institute and its members. Liabilities for state income taxes and the cost of compliance with state income tax laws constitute a substantial expense of conducting interstate business, an expense especially burdensome to small and medium sized businesses. The uncertainty as to the nature and extent of this liability and expense, engendered by the decision below, adds to this burden.

Moreover, the Institute and its members are vitally interested in how this conflict is resolved. The findings of Congress that the diverse income tax laws of the many taxing jurisdictions in this country constituted a heavy burden on interstate commerce apply with undiminished vigor to the distilled spirits industry. The Institute believes it to be of paramount inportance that the applicability of Public Law 86-272 to all its members in each of the states be upheld, and that the decision of the Supreme Court of South Carolina in this case be reversed. The interest of the Institute in the questions presented on this appeal is, therefore, direct and substantial.

ARGUMENT

A. Heublein has not engaged in activities in South Carolina which remove it from the protection of Public Law 86-272.

Public Law 86-272 provides that a business which limits its activities in a state to "the solicitation of orders by such [business], or [its] representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State" are exempt from income taxation in that state. [Public Law 86-272, 15 U.S.C. §381; Jurisdictional Statement, A. 30-32.]

For the years in question, Heublein conducted its business in South Carolina through a single representative in South Carolina, whose primary activity was promoting Heublein products [Order of the Court of Common Pleas (hereinafter "Order"); Jurisdictional Statement, A. 22, 23]. Infrequently, this representative would forward an order for Heublein products to the wholesaler with which Heublein dealt in South Carolina. In the main, however, orders for Heublein products were received directly by this wholesaler from customers in South Carolina. [Order; Jurisdictional Statement, A. 23]. All orders were forwarded to Heublein in Hartford, Connecticut, for acceptance or rejection. Products were shipped pursuant to accepted orders from Hartford, Connecticut, to Heublein in care of its representative at the wholesaler's warehouse in Columbia, South Carolina. [Order; Jurisdictional Statement, A. 23, 24.]

Application of the statutory language to these facts seems straightforward. The orders forwarded by the wholesaler in South Carolina to Heublein in Hartford are clearly "filled by shipment or delivery from a point outside the State." Any possible ambiguity in this clear statutory language is immediately dispelled by its legislative history. The Report of the Senate Committee on Finance states that:

> "... if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.
>
> The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such

> orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State." S. Rep. No. 658, 86th Cong., 1st Sess. 6, 7, 1959.

Congress meant to protect an out-of-state businessman who shipped from a stock of goods maintained out of state, leaving unprotected the businessman who maintained his goods in the state. This is the distinction embodied in the statute, and it applies directly to Heublein's situation. Heublein's stock is maintained in Connecticut and can only get to South Carolina by "shipment . . . from a point outside the State."

In spite of this, the South Carolina Tax Commission argued in the Supreme Court of South Carolina that South Carolina's Alcoholic Beverage Control laws* required delivery and sale to take place in South Carolina, and "therefore, the Interstate Income Law, Public Law 86-272, applicable when delivery is made from a point outside the State, does not apply to grant immunity from South Carolina taxes." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 8, 9.]

This argument is totally beside the point, since the statute speaks in terms of "shipment *or* delivery" (emphasis added). If the shipment is from a point outside the state, it does not matter how or where delivery occurs. Indeed, when shipment is from outside the state, it is quite likely delivery will occur within the state. If Congress wished to protect only businesses where shipment *and* delivery occurred outside the state, it was open to it to do so.

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* South Carolina Code of Laws (1962) §4-131 to §4-150. [Jurisdictional Statement, A. 32-40.]

The Supreme Court of South Carolina apparently misconstrued the Federal statute to require that both shipment and delivery take place outside the state, for it said:

> "Public Law 86-272 is applicable when delivery is made from a point outside the State and is *inapplicable to sales and delivery consummated within the State.*
>
> It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [Jurisdictional Statement, A. 21.] (Emphasis added.)

Alternatively, the Supreme Court of South Carolina grounded its decision on its characterization of the transaction between Heublein and the wholesaler as a "sale" occurring in South Carolina under South Carolina law.

But the Court's characterization under state law of the transaction between Heublein's representative and the wholesaler is simply irrelevant for the purposes of Public Law 86-272. Whether local law determines the scope of the statute is a federal question to be determined by ascertaining the intent of Congress. *R.F.C.* v. *Beaver County,* 328 U. S. 204, 208 (1946). The language and legislative history of Public Law 86-272 make it abundantly clear that Congress did not intend that the application of the statute turn on such questions of local law. Congress made especially plain its dissatisfaction with any test dependent upon the local law of sales. Speaking of tax apportionment, a problem whose unsatisfactory resolution by the states provided substantial impetus to the enactment of Public Law 86-272, the Committee Report states:

> "The committee understands that the formulas currently in use are complex, that even within the formulas the meaning of the basic words are inexact; and that for example, many of the 35 income tax States used a different definition to cover the term 'sale.' It understands that a 'sale' may be considered to have taken place, according to these definitions, in any of these locations: In the place where

> the buyer and seller met; in the place where the goods were manufactured; in the place where the goods were stored; in the place where the transaction was finally approved; in the place where the selling company was domiciled; in the place where the salesman's office was located; *or in the place to which the goods were shipped.* This lack of uniformity creates the possibility that each of a number of different States may regard the same sale as having occurred in it, depending upon the particular definition of 'sale' under its own tax laws. If each of several different States treat the same sale as attributable to it because of its own definition of 'sale' in the State, it is apparent that income from the same sale may be attributed to each of the States under whose law the same sale is to be attributed." S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959). (Emphasis added.)

There could be no more decisive rejection of the point-of-sale test in the context of national tax policy.

Yet the decision of the South Carolina Supreme Court not only employs this rejected test, but employs it to avoid application of the statute, thus reaching a result which ironically enough, emasculates Congressional policy by use of the very test whose application by the states to the problem of income apportionment originally prompted this remedial legislation. This intepretation of the statute, if condoned, means that Congress will never be able to establish a nationally uniform policy of interstate income taxation, for the states, by a bootstrap application of their own law of sales, may hold that their own laws of income taxation apply.

The slender factual underpinning of the decision below emphasizes the ease with which this mode of construction can completely nullify the Federal statute. In *every* case where a person in one state ships goods to a person in another state, local law in the second state can provide that delivery and sale occur there. In the instant case, this result is achieved through interpretation of South Carolina's alcoholic beverage control provisions, but it is quite appar-

ent that this is not the only means open to a state to find a sale or delivery occurring within its borders. This method of statutory interpretation bids fair to bring in its train a return to the chaotic conditions which lead to Public Law 86-272. The history of state taxing provisions, then and now, demonstrates that the states are unwilling or unable to resist expanding their taxing power when they can. There is no reason to suppose that states, feeling pressed for revenue, will refrain from finding a taxable sale or delivery in every constitutionally permissible instance, thus nullifying the statute *in toto*. And it is no answer to suppose that some or all of the states may refrain from extending their taxing power for a time, even for a long time. Congress enacted Public Law 86-272 precisely because it was dissatisfied with the results of leaving this choice to each state.

B. South Carolina's regulatory laws may not be used to frustrate national interstate income tax policy.

Even indulging in the assumption that Heublein's activities in South Carolina were sufficient to take it out of the area protected by Public Law 86-272 will not save the decision below. As that decision makes clear, the Supreme Court of South Carolina held that because of Heublein's compliance with South Carolina's regulatory statutes, Public Law 86-272 did not apply:

> "It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [Jurisdictional Statement, A. 21.]

Indeed, the exact argument made to that Court was that "The legislative intent [was] to require all importers of alcoholic liquors to pay income taxes." [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.] The net result is that whatever the standards embodied in the Federal statute, and whatever the

activities of Heublein (or any out-of-state distiller), South Carolina may simply enact legislation requiring some activity which its courts may interpret as beyond that protected by the Federal law, and then levy its income tax. The result is a procedure which guarantees that, should South Carolina choose, Congress will never be able to apply a national interstate income tax policy to distillers doing business in South Carolina, or indeed in any state which follows South Carolina's example.

The resulting inapplicability of Public Law 86-272 will not be the result of any substantial change in the business activities of distillers in South Carolina, but will rather turn upon an empty judicial conceptualism. The record in this case amply demonstrates the insubstantiality of the changes occasioned in Heublein's South Carolina activities by South Carolina's Alcoholic Beverage Control Laws. [Order; Jurisdictional Statement, A. 22-24.] Yet it is upon these slight changes, amounting in effect to a change in the form of the shipping documents accompanying Heublein's goods shipped into South Carolina, that the decision of the Supreme Court of South Carolina that such were "therefore, intrastate transactions and beyond the reach of Public Law 86-272" must rest.

The purpose of Public Law 86-272 was to protect interstate businesses from state income taxation. The legislative history reveals that Congress was deeply concerned over the chaotic conditions caused by the multiplicity of state income taxation provisions, and the broad language upholding state taxing authority contained in *Portland Cement Co.* v. *Minnesota* 358 U. S. 450 (1959) then recently decided by this Court. As the Committee Report states: "Your committee understands that this apprehension [over the broad language of *Portland Cement*]is due in large part to the burdens of compliance an out-of-State company may be subjected to in ascertaining with respect to every State in which such sales are made, first, the company's 'taxable income' prior to any apportionment for the purposes of the

particular State's tax law, and, secondly, the portion of the company's total 'taxable income' that is 'properly apportioned' to the taxing State under the apportionment formula used by that particular State." S. Rep. No. 658, 86th Cong. 1st Sess. 3 (1959). The Committee noted that the prevailing lack of uniformity among the states made the cost of compliance high, and that the differing standards among the large number of jurisdictions then imposing an income tax (35 States and 8 cities) raised the possibility of double taxation (*id.* at 3). Public Law 86-272 was enacted to alleviate those burdens upon commerce.

The decision of the Supreme Court of South Carolina totally frustrates this policy with respect to a large segment of interstate commerce. Such a result deserves the closest scrutiny wherever it may occur. Such a result certainly ought not to be condoned by this Court when it is the product of a plan looking to just this end.

Moreover, the path of avoidance of the Federal statute now opened up will be quickly followed by other states seeking additional revenues. Indeed, the technique, if validated here, could be easily broadened in its application to cover any aspect of commerce wherein the state could gain a regulatory toehold by virtue of its police power. If this Court upholds this effort by South Carolina to do through purposeful indirection what it cannot do directly, the results for a nationally uniform policy of interstate income taxation will be disastrous.

C. The Twenty-first Amendment does not sanction the imposition of state income taxes on interstate commerce in alcoholic beverages.

The South Carolina Tax Commission argued to the court below that "As Public Law 86-272 relates to the taxation of foreign corporations or businesses and is directly related to the Commerce Clause . . . it must yield to the State's power under the Twenty-first Amendment as does the Commerce Clause." [Brief of the South Carolina Tax Commis-

sion in the South Carolina Supreme Court, p. 7.] This argument has been unequivocally rejected in this Court:

> "To draw a conclusion . . . that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a contention would be patently bizarre and is demonstrably incorrect." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331 (1964); *Cf. Dept. of Rev.* v. *James Beam Co.*, 377 U. S. 341 (1964) (upholding Congressional power under the Export-Import Clause); *Jameson & Co.* v. *Morganthau*, 307 U. S. 171, 173 (1939).

The view that the Twenty-first Amendment left Congress with no power over alcoholic beverages is admittedly difficult to maintain, for as was said in *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944) (upholding power of Congress to set maximum retail liquor prices):

> "Followed to its logical conclusion [the proposition that the Twenty-first Amendment had stripped the national government of all control over interstate commerce in alcoholic beverages], if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under authority of the National Labor Relations Act, 29 U. S. C. A. §151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under authority of the Fair Labor Standards Act, 29 U. S. C. A. §201 et seq." (at 455).

The concept, of course, would extend far beyond this brief list and purport to sweep aside all the important and diverse measures Congress has taken pursuant to the power granted to it by the Commerce clause.

Moreover, the House and Senate debates which preceded Congressional submission of the Amendment demonstrate that no such effect was intended. Congress intended the second clause of the Amendment to protect the dry states through a retention of Federal power. As was said in an article read into the record by Senator Bingham, the clause was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the constitution the right of the dry states to have Federal protection against the importation of liquor".*

While the clause gave to dry states the additional protection of Federal power to enforce their prohibitory legislation, it did not otherwise prevent interstate commerce in liquor. In the words of Senator Glass:

> "In my own intrepretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors. . . . "**

But if South Carolina cannot maintain that the Twenty-first Amendment has repealed the Commerce clause totally, it is left to it to argue the equally questionable proposition that the Twenty-first Amendment has displaced the Com-

* 76 Cong. Rec. 4228 (1933). This was a widely held view. See remarks of Senator Blaine, *id.* at 4140-41; Senator Borah, *id.* at 4170-72; Mr. Gibson, *id.* at 4526.

** Remarks of Senator Glass, 76 Cong. Rec. 4219 (1933).

merce clause in matters of taxation. The history of the Amendment may be sifted in vain, however, for evidence that it was adopted to preserve or extend state taxing power. It is, on the other hand, fundamental to the policy embodied in the Commerce clause that Congress should have the power to regulate matters affecting interstate commerce. *Eg., Nat. Bellas Hess* v. *Dept. of Revenue,* 386 U.S. 753, 760 (1967). It was pursuant to its finding that the multiplicity of state income tax laws constituted a burden on commerce that Congress passed Public Law 86-272 (see discussion *supra,* pp. 8, 9). Where, as here, the state asserts its power to tax, there is no conflict between the Twenty-first Amendment and the Commerce clause. As the Supreme Court of Oklahoma said on similar facts: "No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." *Oklahoma Tax Comm'n* v. *Brown-Forman Distillers Corp.,* 420 P. 2d 894, 898 (Okla. 1966).

Conclusion

For the foreging reasons, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC., APPELLANT,

against

SOUTH CAROLINA TAX COMMISSION, APPELLEE.

ON APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

MOTION TO DISMISS

The Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the Appeal herein on the ground that the judgment of the Supreme Court of the State of South Carolina rests on an adequate nonfederal basis, and further, on the ground that the questions for which review is sought are so unsubstantial as not to need further argument.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal questions the validity of the application of Section 65-222 (the South Carolina Corporation Income Tax Statute) and Sections 65-602 and 65-606 (the South Carolina Corporation License Tax Statutes) of the 1962 Code of Laws of South Carolina to Appellant. Appellant brings this appeal on the ground that said sections are repugnant to the Interstate Income Law, Public Law 86-272, 73 Stat. 555, 15 U.S.C., Section 381.

Section 65-222 provides for an income tax upon the net income of domestic corporations. It further provides for an income tax upon the net income of foreign corporations from business within the jurisdiction of South Carolina.

All corporations that are required to file income tax returns in South Carolina are required to also file an Annual Report. *Section 65-202 of the 1962 Code of Laws of South Carolina.* Section 65-606 of the Code subjects corporations that are required to file said report to license fees.

B. The Proceedings Below

Action was brought in the Court of Common Pleas for South Carolina by Appellant on February 19, 1969, to recover corporation income taxes and corporation license taxes. Appellant contended that the taxation by South Carolina was illegal as its activities within South Carolina did not exceed the minimum standards of Public Law 86-272. Appellant further contended that if its activities exceeded the minimum standards of Public Law 86-272, such were done under compulsion in compliance with the South Carolina Alcoholic Beverage Control Act, and that could not form the jurisdiction for taxation. The Court of Com-

mon Pleas upheld the contentions of the Appellant and the case was appealed to the South Carolina Supreme Court. In the Court's Opinion, filed September 22, 1971, the Supreme Court stated that the Twenty-first Amendment to the United States Constitution gave South Carolina the power to prescribe the conditions under which alcoholic liquors may be imported into South Carolina. It furthermore stated that the Alcoholic Beverage Control Act, adopted by South Carolina under the powers reserved by the Twenty-first Amendment, particularly Sections 4-131 and 4-150 of the South Carolina Code of Laws, provides that producers of alcoholic liquors, before shipping liquor into South Carolina, must be registered with the State and that a "producer representative" who is a resident of South Carolina must be appointed to accept delivery within the geographical bounds of South Carolina for the producer. Thereafter the producer, through the representative, is authorized to make an intrastate delivery of the liquors from within South Carolina to a licensed wholesaler within the State. The delivery must then be certified to the Tax Commission. Sale and delivery of alcoholic liquors by Appellant in compliance with the Act were held to be made "intrastate" as interstate sale and delivery are expressly precluded. Public Law 86-272 was therefore held to be inapplicable and the decision of the Court of Common Pleas was reversed.

II

ARGUMENT

A.

The judgment of the South Carolina Supreme Court rests upon a determination that Appellant's activities within South Carolina were such to render Appellant liable for Income and License Taxes. The judgment of the Supreme Court is in fact based upon a nonfederal ground upon which this court should not exercise its jurisdiction of review.

The questions presented in Appellant's Jurisdictional Statement can be consolidated into the question: "Is the Appellant exempt from State taxation because of Public Law 86-272?" Public Law 86-272 provides that no state shall have the right to impose a tax on net income, or a tax measured by net income, on income derived within the state by a company if the only business activities within the state by or on behalf of such company are the solicitation of orders within the state for tangible personal property and the maintenance and operation within the state of a sales office. To qualify, all such orders must be sent outside the state for approval or rejection, and if approved, must be sent by shipment or delivery from a point outside the state.

The Supreme Court of South Carolina held that Appellant's activities in compliance with the Alcoholic Beverage Control Act of South Carolina were intrastate and were therefore beyond the minimum protection of Public Law 86-272.

This Court has consistently adhered to the principle that it will not review a judgment of a state court that is based upon an adequate and independent nonfederal ground even though a federal question is involved which may perhaps be wrongly decided. *Murdock v. Memphis,* 20 Wall 590; *Berea College v. Kentucky,* 211 U. S. 45, 53; *Fox Film Corporation v. Muller,* 296 U. S. 207. The Court's power

over a state judgment is therefore to correct the judgment to the extent that federal rights are wrongly adjudged.

The judgment of the Supreme Court of South Carolina was based solely upon a nonfederal finding that Appellant's activities within South Carolina were intrastate activities beyond the protection of Public Law 86-272. Appellant was thus adjudged to be subject to South Carolina taxation.

The appeal of *Clairol, Inc. v. Director, Division of Taxation,* was dismissed by this Court on April 19, 1971, Opinion No. 1367, for want of a substantial federal question. This Court refused to review the judgment of the Supreme Court of New Jersery, 57 N. J. 199, 270 A. (2d) 702, holding that Clairol was not exempted from New Jersey taxation by Public Law 86-272 because of the local activities within the State. Appellee therefore respectfully submits that its Motion to Dismiss should be granted as the basis for the dismissal of the Clairol appeal is presented again for review in the present case.

The Twenty-first Amendment to the United States Constitution reserves to a state exclusive right to control the flow of alcoholic liquors for delivery or use therein. Appellant transported alcoholic liquors for delivery or use within South Carolina, and in so doing complied with the Alcoholic Beverage Control Act of South Carolina, enacted under the authority of the Twenty-first Amendment. The State Supreme Court made a determination that Appellant's sale and delivery of alcoholic liquors within South Carolina, in compliance with said Act, were local activities beyond the protection of Public Law 86-272, thereby precluding its application. This judgment is based solely upon adequate and independent State grounds. Appellee therefore respectfully submits that the Court lacks jurisdiction to take this appeal and that the same should be dismissed.

B.

The judgment of the Supreme Court of South Carolina is based upon a determination that the conditions imposed by the South Carolina Alcoholic Beverage Control Act for importing alcoholic liquors into South Carolina for sale and use therein were within the powers reserved to the states by the Twenty-first Amendment to the United States Constitution, and that Appellant's voluntary compliance with this Act thereby subjected it to South Carolina Corporation Income and License Taxes. The issue of the power of the States over alcoholic liquors presents no substantial question not previously decided by this Court.

The judgment of the Supreme Court of South Carolina is based upon a finding that the South Carolina Alcoholic Beverage Control Act was adopted under the powers reserved to the states by the Twenty-first Amendment to the United States Constitution. Further, said judgment is based upon a finding that Appellant complied with the Act in its business of selling and delivering alcoholic liquors within South Carolina, thereby becoming amenable to the State income and license taxing statutes.

The Twenty-first Amendment to the United States Constitution provides that the transportation or importation of intoxicating liquors into any state for delivery or use therein in violation of its laws is prohibited. This Court has recognized the power of the states to regulate or prohibit the importation of alcoholic liquors as being practically unlimited, irrespective either of the commerce clause or the equal protection clause of the Constitution. *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132.

In several cases this Court has held that the states, having absolute power to prohibit the manufacture, sale, transportation or possession of intoxicants, could adopt a lesser degree of regulation rather than total prohibition. *Ziffrin, Inc. v. Reeves, supra; State Board of Equalization v. Young's Market Co., supra.*

In *Phillips v. City of Mobile,* 208 U. S. 472, an ordinance in the nature of a revenue act was upheld in validity as being within the police power of a state under the Wilson Act. This Court stated:

> "The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it."

In *United States v. Frankfort Distilleries,* 324 U. S. 293, this Court held that as a matter of constitutional law, the result of the Twenty-first Amendment is that a state may erect any barrier it pleases to the entry of intoxicating liquors. Further, if a state chooses not to exercise the power given by the Twenty-first Amendment, then it is said that the operation of the commerce clause continues, but if the state exercises this power, then the commerce clause is subordinate to the exercise of the state's power under the Twenty-first Amendment. The Sherman law, which was in issue, was thus held to have no greater potency than the commerce clause itself, as the law derived its authority

from the commerce clause which yields to state power drawn from the Twenty-first Amendment.

In *United States v. Maryland State Licensed Beverage Association*, 138 F. Supp. 685, reversed on other grounds, 240 F. (2d) 420, it was held that valid legislation by a state under the Twenty-first Amendment is paramount to conflicting legislation under the commerce clause. Public Law 86-272 relates directly to the commerce clause and therefore must yield to the state's power under the Twenty-first Amendment. Appellee therefore respectfully submits that the appeal of the Appellant should be dismissed as no substantial question not previously decided by this Court is presented in this case.

CONCLUSION

C.

Appellee respectfully submits that the appeal herein should be dismissed on the grounds that the judgment of the Supreme Court of South Carolina rests on an adequate, nonfederal basis and that the questions for which review is sought are so unsubstantial as not to need further argument.

DANIEL R. McLEOD,
G. LEWIS ARGOE, JR.,
JOE L. ALLEN, JR.,
JOHN C. von LEHE,
Attorneys for Appellee, South Carolina Tax Commission.

I hereby acknowledge acceptance of service of Appellee's Motion to Dismiss this .... day of ....., 1972.

W. CROFT JENNINGS, JR.,
Counsel for Heublein, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Supreme Court of South Carolina is reported at 254 S.C. 17, 183 S.E. 2d 710. It is set out at p. 35 of the Appendix. The unreported Order of the Court of Common Pleas has been set out at p. 28 of the Appendix.

Jurisdiction

The decision of the Supreme Court of South Carolina was filed September 22, 1971. On October 11, 1971, a petition for rehearing was denied and on January 7, 1972, Appellant filed its Jurisdictional Statement in this Court.

Probable jurisdiction was noted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1257(2).

Questions Presented

The Supreme Court of South Carolina held that Public Law 86-272 did not protect Heublein from South Carolina corporate income taxes because in compliance with South Carolina's Alcoholic Beverage Control laws Heublein, as an out-of-state producer, made its interstate shipments of alcoholic beverages to an unrelated South Carolina wholesaler through Heublein's local South Carolina representative instead of directly to such wholesaler. The questions thus presented are:

(1) Did the Supreme Court of South Carolina err in holding that the transfer of Heublein's alcoholic beverage products through its local representative in South Carolina pursuant to requirements of State liquor laws caused Heublein's interstate shipments to lose the protection of the Interstate Income Tax Act, Public Law 86-272?

(2) If so, may South Carolina properly avoid the application of Public Law 86-272 to income from interstate commerce by basing its jurisdiction to assess a South Carolina income tax against Heublein on activities of Heublein's South Carolina representative which South Carolina liquor laws require him to perform?

Statutes and Constitutional Provision Involved

Public Law 86-272, 15 U.S.C. 381, *et seq.*, provides in pertinent part that:

> *"Imposition of net income tax—Minimum standards*
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the

income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

The full text of Public Law 86-272 appears in the Jurisdictional Statement, pp. A. 30-32. The South Carolina Alcoholic Beverage Control laws (hereinafter, ABC laws), and the South Carolina corporate income and license tax statutes appear at pp. A. 33-40, and A. 40-41 of the Jurisdictional Statement, respectively. Amendment XXI of the Constitution of the United States appears at pp. A. 29-30 of the Jurisdictional Statement.

Statement

Appellant, Heublein, Inc., a Connecticut corporation not qualified to do business in South Carolina [App. 8], engages in the manufacture and sale of alcoholic beverages. Heublein employs a representative in South Carolina who promotes the sale of its products by calling on retail accounts and by briefing salesmen employed by an unrelated wholesaler. [Order: App. 29-30]. The wholesaler sends

orders for Heublein products to Heublein in Hartford, Connecticut for acceptance or rejection. If accepted, these orders are filled by shipment from Hartford.

South Carolina in 1958 enacted its Alcoholic Beverage Control Act, the text of which appears in The Jurisdictional Statement, A. 32-40. The Supreme Court of South Carolina summarized the effect of this Act as requiring that:

> "... a producer of alcoholic beverages, before shipping liquor into South Carolina, must be registered with the State and that such producer appoint a 'producer-representative' who shall be a resident of the State. It is further provided that shipment of alcoholic liquors into the State must be made to the 'registered representative' of the producer who must accept delivery of the liquors within the geographical limits of South Carolina. Thereafter, the producer, through his representative, is authorized to make delivery of the alcoholic liquors from within South Carolina to a licensed wholesaler in the State. The 'producer-representative' then certifies as to such delivery to the appellant Tax Commission." [App. 36.]

In practice, Heublein shipped its products by common carrier to the wholesaler's warehouse in Columbia, South Carolina [App. 10] and mailed the bills of lading to the Heublein representative in South Carolina, who turned them over to the wholesaler pursuant to a Certificate of Transfer obtained from the Alcoholic Beverage Control Commission, sending the Commission a copy of the invoice. [Order: App. 30-31.] This practice fulfills the requirements of the ABC law. [App. 23, 37.]

The South Carolina Tax Commission assessed Heublein for state income and license* taxes for taxable years 1964 through 1968, inclusive, rejecting Heublein's claim that

* Liability for license taxes depends upon liability for income taxes.

Public Law 86-272 prevented the imposition of these taxes. [Jurisdictional Statement, A. 28, 29.]

Heublein paid the taxes in February, 1969, and brought suit to recover them in the Court of Common Pleas.* That court, after trial, held that Heublein's activities in South Carolina "did not exceed the minimum activities permitted by Public Law 86-272" [Order: App. 33], and that even if they did, it was only as a result of state compulsion and therefore "Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power." [Order: App. 34.]

The Supreme Court of South Carolina reversed, on the grounds that compliance with South Carolina's ABC laws sufficed to strip Heublein of the protection of Public Law 86-272.

SUMMARY OF ARGUMENT

Heublein, Inc. is a Connecticut Corporation engaged primarily in the manufacture and distribution of alcoholic beverages. During the years in question, Heublein maintained no office, warehouse or stock of goods within South Carolina.

The alcoholic beverage products of Heublein were distributed in South Carolina by an unrelated wholesaler. This wholesaler sent orders for Heublein products to Heublein at Hartford, Connecticut. Upon acceptance of an order, Heublein delivered its products to a common carrier in Hartford with instructions to the carrier to make delivery at the wholesaler's warehouse in South Carolina.

In compliance with South Carolina's Alcoholic Beverage Control laws (ABC laws,) Heublein maintained within

* The amount of the tax owing, should liability be found, is not in dispute.

South Carolina a resident producer-representative who was a consignee of Heublein shipments to the South Carolina wholesaler. In accordance with these ABC laws, the producer-representative endorsed the shipping documents and obtained the necessary official clearance in accomplishing the legal transfer of title in South Carolina of the Heublein products from Heublein to the unrelated wholesaler. The other functions of the Heublein producer-representative in South Carolina were to promote the sale of Heublein products by calling on retailers within the State and by briefing the salesmen employed by the wholesaler. The Heublein producer-representative had no authority to take or accept orders for Heublein products and did not take such orders.

It is the position of Heublein that Public Law 86-272, the Interstate Income Tax Act, prevents South Carolina from imposing an income tax on Heublein. Public Law 86-272 prohibits a State from imposing an income tax on income from interstate commerce if the only business activities within the State by the taxpayer are the solicitation of orders for sales of tangible personal property which orders are sent outside the State for approval or rejection and, if approved, are filled by shipment of delivery from a point outside the State.

Heublein's business activities within the State of South Carolina did not exceed the business activities specified in Public Law 86-272 and, therefore, Heublein was exempt by Federal statute from the imposition of a South Carolina income tax. This conclusion is mandated by the plain meaning of the Federal statute.

The required retention by Heublein of legal title to its alcoholic beverage products until such products were physically within South Carolina and its transfer of such title

to the wholesaler in South Carolina were not business activities within South Carolina which would cause Heublein to lose the protection of Public Law 86-272. The legislative history of Public Law 86-272 demonstrates that the Congressional intent was to establish a uniform national standard for the imposition of local income taxes on multistate businesses and that such standard was concerned with the economic substance of interstate sales and shipments and not with the technical legalities of transfer of title or situs of sale. Thus, the Supreme Court of South Carolina has erred in holding that the transfer of technical legal title within the State of South Carolina in compliance with the State's ABC laws negated the application of Public Law 86-272 to Heublein's sales and shipments in interstate commerce. This position of the Supreme Court of South Carolina disregards the facts of the instant case as determined by the Trial Court, and is based upon a place-of-sale test which has been rejected by Congress and by the highest courts of other States.

It is further Heublein's position that South Carolina may not properly avoid the application of Public Law 86-272 by requiring Heublein to complete the transfer of title to interstate shipments within the State under its ABC laws and then using these required activities as the basis for its jurisdiction to impose an income tax on Heublein. If South Carolina is permited to avoid the application of Public Law 86-272 by this bootstrap approach, the effectiveness of the Federal statute will be substantially nullified not only as to alcoholic beverage products but as to all products sold in interstate commerce.

The consequences of either allowing the States to determine the applicability of Public Law 86-272 by reference to their local law of sales, or by reference to activities re-

quired by the States themselves, are disastrous to the policies embodied in the Federal Statute as applied to all segments of interstate commerce. In either case, the Statute will cease to shape State taxing policy, but will instead conform to whatever tax result each State chooses to achieve. Not only will this emasculate Public Law 86-272, but if condoned here, these methods of statutory construction undercut any attempt by Congress, now or in the future, to regulate State income taxation of interstate commerce.

South Carolina's attempt to use the Twenty-first Amendment to justify its imposition of income tax on Heublein must fail simply because the Twenty-first Amendment does not further the interest of any State in income tax revenues. No South Carolina regulatory law has been questioned: The question is whether South Carolina may impose its general corporate income tax on Heublein. The South Carolina corporate income tax is not a regulatory measure. Public Law 86-272 is a regulatory measure, but it regulates State income taxes, not alcoholic beverages. The conflict presented in this case is between South Carolina's corporate income tax statute and Congressional legislation regulating State income tax statutes: the Twenty-first Amendment is not relevant to the solution of this conflict. Moreover, even if Public Law 86-272 regulated alcoholic beverages, it is clear that the Twenty-first Amendment has not deprived Congress of all power over alcoholic beverages. The Twenty-first Amendment does not render Public Law 86-272 inapplicable to the alcoholic beverage industry.

ARGUMENT

I.

Heublein's Activities in South Carolina Do Not Remove it From the Protection of Public Law 86-272.

The essentially undisputed facts in this case establish that, for the years in question, Heublein conducted its business in South Carolina through a representative who traveled the State promoting Heublein products, and through an unrelated wholesaler which purchased the Heublein products for resale to its customers. All orders for Heublein products were made by the wholesaler to Heublein in Hartford, Connecticut, where they were accepted or rejected.

Upon acceptance of an order, Heublein delivered its products to a common carrier in Hartford with instructions to the carrier to make delivery at the wholesaler's warehouse in South Carolina and with the bill of lading made out in the name of Heublein's representative in South Carolina and the wholesaler. The shipping papers were then mailed to Heublein's representative in South Carolina who obtained transfer clearance from the Alcoholic Beverage Control Commission and who then completed the transfer of the products to the wholesaler by delivery of the bill of lading. In many instances, the physical delivery of the products to the wholesealer's warehouse was completed prior to the transfer of the title papers.

The application of Public Law 86-272 to this simple factual pattern presents no apparent difficulty. The Statute provides that:

> "(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on

the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

Heublein fits within the plain language of the Statute: It solicits orders in South Carolina as permitted by subsection (1); it is undisputed that orders are sent to Heublein in Hartford for "approval or rejection"; and it would be hard to find a clearer instance than that portrayed by the facts in the present case of orders which are "filled by shipment or delivery from a point outside the State."

The legislative history reinforces this interpretation of the clear statutory language. If anything, the circumstances from which the Statute springs, and the Congressional purpose it embodies, argue even more imperatively that it apply in this case.

In February, 1959, this Court decided *Northwestern Cement Co.* v. *Minn.*, 358 U.S. 450, upholding State power to tax interstate business, provided only there was a sufficient nexus between the enterprise sought to be taxed and the taxing state.

Speaking for the majority, Mr. Justice Clark noted that the burgeoning of interstate commerce, and the absence of Congressional regulation of its taxation by the States, left this area of the law to develop through the courts (*Id.* at 457). As the opinion pointed out, the results were not entirely satisfactory; and Mr. Justice Frankfurter's dissent articulated some of the causes:

> "I am not unmindful of the extent to which federal taxes absorb the taxable resources of the Nation, while at the same time the fiscal demands of the States are on the increase. These conditions present far-reaching problems of accommodating federal-state fiscal policy. But a determination of who is to get how much out of the common fund can hardly be made wisely and smoothly through the adjudicatory process. In fact, relying on the courts to solve these problems only aggravates the difficulties and retards proper legislative solution.
>
> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of

> the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency." *Id.* at 475-477.

The view that Congress ought to act in the area of State taxation was far from new. Justice Frankfurter himself had expressed it before*, as had other members of this Court.**

Congress quickly reacted to the *Northwestern Cement* decision and the subsequent refusal of this Court to hear *Brown Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed* 359 U. S. 28 (1959), and accepted the invitation to apply itself to the subject. Congress was aware of the problems that the multiplicity of taxing jurisdictions had produced: problems of apportionment and of determining taxable income according to rules which varied from state to state which, in turn, lead to the possibility of multiple taxation of the same income, or no taxation at all; and, above all, to the staggering complexity of the law which made compliance difficult

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* *McCarrol* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 188-89 (1940) (dissenting opinion); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 300 (1944).

** *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 327 (1938) (Black, dissenting opinion); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 448-55 (1939) (Black, dissenting opinion); *McCarrol* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 188-89 (1940) (Black, Douglas, Frankfurter, dissenting opinion); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 306-07 (1944) (Jackson, concurring opinion); *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 360 (1944) (Rutledge, concurring opinion).

and costly. [S. Rep. No. 658, 86th Cong. 1st Sess. 2-4 (1959)]. As the Committee reports make clear, not only was Congress mindful of the chaotic conditions then prevailing in the state taxation area, it was also concerned over the apparently broad sanction the *Northwestern* decision gave to the state taxing efforts. Realizing the complexity of the area, a complexity augmented by the presence of conflicting interests among those whose cooperation was required to come to grips with the problem, Congress sought to stabilize state taxation so that it might take the time necessary to evolve a comprehensive solution. [H.R. Rep. No. 936, 86th Cong. 1st Sess. 2, 3 (1959); S. Rep. No. 453, 86th Cong. 1st Sess. 12 (1959); S. Rep. No. 658, 86th Cong. 1st Sess. 5 (1959)].

Congress chose to effect this stabilization by limiting state taxing power. Senate Report 453 recommended this approach [S. Rep. No. 453, 86th Cong. 1st Sess. p. 12 (1959)] and the statute enacted embodied it.

Congressional intent to establish a uniform standard that would protect multistate business in each state clearly emerges from the proposals and recommendations. An early proposal would have prohibited state taxation of multistate enterprises which did not maintain a place of business within the taxing state [S. Rep. No. 453, *supra* 14; S. J. Res. 113]. The scope of the protection ultimately decided upon is spelled out in the Senate Finance Committee Report accompanying the final bill:

> ". . . if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income

tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.

The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State." S. Rep. No. 658, 86th Cong. 1st Sess. 6, 7, (1959).

Heublein is clearly within the Statute

This remedial legislation clearly applies to this case. The trial court found that Heublein's solicitation activities within the state did not exceed those allowed by Public Law 86-272, a finding which the South Carolina Supreme Court left undisturbed. The orders are plainly sent to Hartford for approval or rejection, nor is there any doubt that Heublein ships from out-of-state: Heublein warehouses its stock in Connecticut and can only get its products to South Carolina by "shipment . . . from a point outside the State." The Committee Report shows that Congress meant to protect a businessman who shipped from a stock of goods maintained outside of the state, leaving unprotected those who maintained their stocks in the state. The business location test of the earlier proposal is thus, to this extent, intentionally continued in Public Law 86-272. This is the criterion embodied in the Statute, and Heublein fits within it.

The Supreme Court of South Carolina misconstrued Public Law 86-272

The Supreme Court of South Carolina nonetheless decided that Public Law 86-272 did not apply to Heublein because Heublein, in shipping its goods into the state, had complied with South Carolina's Alcoholic Beverage Control Laws, [South Carolina Code of Laws (1962); Jurisdictional Statement, A. 32-40].

The pertinent section of this law, §4-141 South Carolina Code of Laws (1962 as amended) [Jurisdictional Statement, A. 39] provides that:

> ". . . alcoholic liquors [shipped from outside South Carolina] shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property of the registered producer originating the shipment . . . after delivery to the producer's representative is complete, [the alcoholic liquors] may then be shipped . . . to a duly licensed wholesaler."

In practice, the products were physically shipped to the wholesaler's warehouse and the shipping documents showed the Heublein representative as a consignee. This practice is acceptable under the South Carolina law, as was elicited at the trial of this case:

> "The Court: It's your interpretation then, of that law, that Heublein or any other manufacturer of similar products would be required to actually have in existence some type of warehouse or building in to which the shipment was unloaded and then be reloaded and taken to the distributor?
>
> "Mr. Argoe [representing the South Carolina Tax Commission]: Physically, it does not have to be handled that way . . . .
>
> "The Court: Well, let's assume as has been testified to that [Heublein's representative] has a desk at

> [the wholesaler's] office. Wouldn't it be practical for the shipper to come to [Heublein's representative] with the shipment at [the wholesaler's] office and hand him a document and say that the product that was ordered is outside in the truck and then for [Heublein's representative] to notify [the wholesaler] and it be unloaded into [the wholesaler's] warehouse?
>
> "Mr. Argoe: In practice that is accepted by law, but delivery must be made directly to the producer representative. In practice the liquor may be delivered, consigned to this particular destination or point, but by law, they are required to accept delivery. Heublein cannot ship from without the State liquor direct to the wholesaler within the State." [App. 23]

The ABC laws thus require that the producer retain technical legal title until the alcoholic beverages arrive in South Carolina. Only after the products have physically arrived in South Carolina may the producer complete the passage of title to the licensed wholesaler, even though the products may be in the wholesaler's warehouse at that time.

The South Carolina Tax Commission apparently took the position that the mandated passage of title within South Carolina results in an intrastate sale, and not a sale in interstate commerce. The Commission then argued that since the sales occur in South Carolina, "The Interstate Income Law, Public Law 86-272, applicable when delivery is made from a point outside the State, does not apply to grant immunity from South Carolina taxes." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 8, 9.] Thus, the Commission's entire case rests on the proposition that the endorsement and transfer in South Carolina of title documents by Heublein's local representative to the licensed wholesaler in South Carolina, as required by the ABC laws, constitute intrastate

sales occurring in South Carolina and therefore beyond the scope of protection of Public Law 86-272.

It is apparent that the whole thrust of the Commission's argument is beside the point since Public Law 86-272 speaks in terms of filling orders for products by "shipment or delivery from a point outside the State." The plain language of the statute demonstrates that Public Law 86-272 is concerned with the physical location of goods when ordered and shipped in interstate commerce, and not with the technicalities of determining place of sale or passage of title. Further, the Senate Report speaks of "shipment or delivery *from* a stock of goods . . . located out of the State" [S.Rep. No. 658, 86th Cong. 1st Sess. 6 (1959) (emphasis added)], emphasizing that it is where the goods are from that counts. This is in keeping with the thrust of the statute, which is to focus on how sales are solicited, and where the goods are located when an order is filled.

Furthermore, commercial reality confirms that the sale which takes place between Heublein and the wholesaler occurs in Connecticut, rather than South Carolina. Heublein completes its part of the substantive requirements of the transaction in Connecticut when it puts the goods into the hands of the common carrier at Hartford, Connecticut and mails the invoice to the wholesaler. At this point, Heublein can be said to have performed the last substantive act required to transfer ownership. There is left only the purely documentary formality performed by Heublein's representative in South Carolina, when he signs the shipping documents over to the wholesaler and informs the Alcoholic Beverage Control Commission of the transfer. Even this was usually done "after the fact" [App. 19]. At most, Heublein retains bare legal title, for the purpose of ensuring compliance with South Carolina's regulatory laws. But this is hardly enough, as a matter of tax policy, to negate the application of Public Law 86-272 to what is

clearly an interstate transaction. For example, dealing with this situs of sale problem as it arises under the Internal Revenue Code of 1954, §861, Treasury Regulation section 1.861-7(c) provides that "a sale of personal property is consummated at the time when, and the place where, the rights, title and interest of the seller in the property are transferred to the buyer. Where bare legal title is retained by the seller, the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss." [Treas. Reg. §1.861-7(c) (1957)]

In short, putting aside for the moment questions of technical delivery for the purposes of South Carolina ABC laws, delivery is made to the buyer when Heublein puts its product in the hands of the carrier, at Hartford. The question we come down to, then, is whether, in examining a pattern of commercial transactions in order to determine their tax consequences under tax laws of general application, the technical concepts of delivery which have grown up under South Carolina's ABC laws ought to be dispositive. It seems they should not, especially where these concepts are empty of substantial factual content, and lead to results in conflict with those determined under the bodies of law which traditionally govern the substance of the transactions in question.

The South Carolina Tax Commission contended that the South Carolina Supreme Court's holding that the sales here involved were "intrastate transactions and beyond the reach of Public Law 86-272 [App., 37] is a non-federal holding resting upon state law. [Motion, pp. 4, 5.] But whether the scope and applicability of the federal statute is determined by state law depends upon the intent of Congress, *Reconstruction Finance Corporation* v. *Beaver County*, 328 U. S. 204, 208 (1946).

The language and legislative history of Public Law 86-272 make it abundantly clear that Congress did not intend that the application of the statute turn on such questions of

local law. Congress made especially plain its dissatisfaction with any test dependent upon the local law of sales. Speaking of tax apportionment, a problem whose unsatisfactory resolution by the states provided substantial impetus to the enactment of Public Law 86-272, the Committee Report states:

> "The committee understands that the formulas currently in use are complex, that even within the formulas the meaning of the basic words are inexact; and that for example, many of the 35 income tax States used a different definition to cover the term 'sale'. It understands that a 'sale' may be considered to have taken place, according to these definitions, in any of these locations: In the place where the buyer and seller met; in the place where the goods were manufactured; in the place where the goods were stored; in the place where the transaction was finally approved; in the place where the selling company was domiciled; in the place where the salesman's office was located; or *in the place to which the goods were shipped.* This lack of uniformity creates the possibility that each of a number of different States may regard the same sale as having occurred in it, depending upon the particular definition of 'sale' under its own tax laws. If each of several different States treat the same sale as attributable to it because of its own definition of 'sale' in the State, it is apparent that income from the same sale may be attributed to each of the States under whose law the same sale is to attributed." S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959). (Emphasis added.)

There could be no more decisive rejection of the point-of-sale test in the context of national tax policy. Reimporting it can only destroy the uniformity which Public Law 86-272 is designed to achieve.

Moreover, if local law determining the point of sale is allowed to govern the application of Public Law 86-272,

South Carolina could always, as it has done below, bootstrap itself out of the area governed by the Federal statute and apply its own tax laws. The result thus achieved, ironically enough, avoids application of the Federal statute by means of the rejected state law point-of-sale test the statute was designed to supplant.

Perhaps more remarkable than the South Carolina Supreme Court's recourse to the mandatory passage of bare legal title provisions in the ABC laws to determine the place of sale for purposes of not applying Public Law 86-272, is its failure to discuss the facts of the case before it. Public Law 86-272 has been before state courts of last resort on several occasions, and in each, a starting point in the analysis of its applicability is a consideration of the particular facts presented. See *State ex. rel. CIBA Pharmaceutical Products, Inc.* v. *State Tax Commission*, 382 S.W. 2d 645 (Mo. 1964); *Smith Kline & French Laboratories* v. *State Tax Commission*, 241 Or. 50, 403 P. 2d 375 (1965); *Herff Jones Company* v. *State Tax Commission*, 247 Or. 404, 430 P. 2d 998 (1967); *Clairol, Incorporated* v. *Kingsley*, 109 Su. 22, 262 A. 2d 213, *aff'd*, 57 N.J. 199, 270 A. 2d 702, *appeal dismissed* 91 S. Ct. (1971) No. 1367; *Hervey* v. *AMF Beaird, Inc.*, 464 S.W. 2d 557 (Ark. 1971).

As the Supreme Court of Oregon said in *Cal-Roof Wholesale, Inc.* v. *State Tax Commission*, 242 Or. 435, 410 P. 2d 233 (1966), speaking of its decision in *Smith Kline & French, supra:*

> "The particular facts of the *Smith Kline & French* case, not consideration of the label to be applied, made the prohibition of Public Law 86-272 there applicable." (at 239)

The Supreme Court of Oregon pointed out that the label there rejected, "intrastate", was of questionable relevance:

> "The application of Public Law 86-272 is not predicated upon judicial distinction between inter or intra-state activities. The constitutional power of Congress to regulate inter-state commerce carries with it the power to regulate state taxation of intra-state activities if such tax affects inter-state commerce." (at 239)

The South Carolina Supreme Court has nonetheless chosen to apply the label in this case, apparently feeling it dispositive even in the absence of factual analysis.

The trial court, on the other hand, extensively analyzed Heublein's activities in South Carolina. It found that Heublein had "no office, no warehouse, no telephone listing, no automobile, and no mailing address in South Carolina." [Order: App. 30.] After consideration of the stipulation of facts entered into by the parties and taking testimony, that court further found that "Heublein did not exceed the minimum activities permitted by Public Law 86-272, and therefore Heublein is not liable for South Carolina income or license taxes." [Order: App. 33.] The Supreme Court of South Carolina, by leaving these trial court findings undisturbed, by neglecting to discuss the facts at all, rested its entire position on its faulty analysis of Public Law 86-272. But this is an analysis which, if condoned, means that regardless of what the facts may be, because State law says that technical legal title must pass in South Carolina, interstate commerce becomes intrastate commerce and Public Law 86-272 does not apply.

The result reached is patently absurd. Not only does Heublein lose the protection Public Law 86-272 was meant to give, but by cutting its decision loose from any factual foundation, the South Carolina Supreme Court has ensured that every out-of-state seller of alcoholic beverages will similarly be denuded of this protection. Indeed, the alcoholic beverage industry need not face this hazard alone.

There is nothing to prevent any state from finding a sale occurring within its borders as a matter of state law in every constitutionally permissible instance, thus nullifying Public Law 86-272 *in toto* for all industries.*

As a consequence, Public Law 86-272 will conform to, rather than shape, the taxing policy of each state. This result, accomplished through judicial interpretation, will effectively abort this initial attempt by Congress to regulate this chaotic field, and hand the matter back to the courts, which will continue to be ill-equipped to handle it. (see pp. 11, 12, *supra*). This result is particularly unpalatable because it calls into question the ability, as a practical matter, of Congress ever to regulate effectively state taxation.**

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* As an example of what could be achieved under local law, California provides that "Sale includes . . . soliciting or receiving an order for [alcoholic] beverages". Deerings California Business and Professions Code Annotated, section 23025. This could effectively convert a solicitation protected in plain terms by Public Law 86-272 into a 'sale' occurring in California, with the consequence, were the reasoning of the South Carolina Supreme Court to be followed, that the Federal Statute did not apply.

** The passage of time has only reaffirmed the necessity for effective Federal regulation of State income taxation of interstate commerce. "The conclusion is inescapable that the voluntary adoption by the States of any kind of uniform sytem is a slow and halting process, if not a virtual impossibility. Efforts over many years have failed to achieve any marked degree of acceptance of uniformity of tax base or division-of-income rules. The result has been that highly regarded State tax administrators have themselves concluded that if uniformity is to be achieved, it can be done only by Federal action." H.R.Rep. 1480 88th Cong. 2d Sess. 133 (1964). The Report was equally clear as to the continued consequences of disuniformity:

> "This, then, is an assessment of the State income tax system and its effect on interstate commerce in the United States today. It is the picture of a system which works badly for both business and the States. It is the picture of a system in which the States are reaching farther and farther to impose smaller and smaller liabilities on more and more companies. It is the picture of a system which calls upon tax administrators to enforce the unenforceable, and the taxpayer to comply with the uncompliable." *Id.* at 598.

Once the principle is established that national legislation in this field is subject to the vagaries of local law, all future Congressional legislation on this topic risks the fate of Public Law 86-272.

II.

A. South Carolina's Regulatory Laws May Not Be Used To Frustrate Congressional Interstate Income Tax Policy.

The assumption, for the sake of argument, that Heublein's business activities in South Carolina were in excess of those activities which Public Law 86-272 protects, fails to justify the decision below. As that decision makes clear, the Supreme Court of South Carolina held that it was precisely because Heublein had complied with the ABC laws that Public Law 86-272 did not apply:

> "It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [App. 37.]

The intriguing implication is that South Carolina may require an out-of-state company to engage in activities in excess of those which Public Law 86-272 protects, and thus subject the company to state taxation. The Court found no difficulty with the assertion by the South Carolina Tax Commission that "It is the legislative intent [of South Carolina] to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.]

The consequences of this approach are indeed unfortunate for the Federal statute and the policy it serves, for this is

no less than an open invitation to South Carolina, or any state, to exercise its regulatory ingenuity to devise mandatory activities which state courts may interpret as beyond the protection of the Federal statute. The net effect will be to burden commerce with both the regulations called forth by this invitation and the income taxes Congress sought to prevent.

Application of this technique need not be limited to the alcoholic beverage industry, for while that industry is undoubtedly subject to state regulation, state police powers are wide ranging and encompass many, if not most, articles of commerce. The trial court perceived this problem and sought to avoid it by holding that while South Carolina could impose special requirements, that nonetheless, "compliance with such requirements cannot deprive Heublein of the effectiveness or applicability of the Federal law on this subject. Such State-imposed minimum requirements therefore come within the minimum activities protected by Public Law 86-272. To hold otherwise would set the various taxing authorities free to devise all manner of restrictive regulations so that they might avoid the effect of Public Law 86-272." [Order: App. 33.]

An analogous situation faced the Supreme Court of Oregon in *Smith Kline & French Laboratories* v. *State Tax Comm'n*, 241 Or. 50, 403 P. 2d 375 (1965). There, Smith Kline & French sent representatives into Oregon to "detail" physicians, hospitals and others in an effort to promote sales of its ethical drugs. Because of restrictions on the sales of prescription drugs to the general public, Smith Kline & French could not directly solicit the ultimate users of its products. In response to the Tax Commission's argument that Smith Kline & French consequently did not fall within the protective ambit of Public Law 86-272, the Court said:

> "the nature of plaintiff's business makes its activities in Oregon the equivalent of solicitation of orders in

> other, less technical businesses. Ethical drugs are generally purchased by the public from retail druggists. The drug to be purchased is selected, not by the purchaser, but by his physician. An ethical drug sales effort comparable to direct solicitation of orders for shoes, valves, or cement requires 'selling' the physician on the wisdom of prescribing the particular product for his patient. By soliciting the stocking of plaintiff's products by druggists and the prescription of those drugs by physicians, plaintiff's detail men perform the same sales function in plaintiff's field that salesmen soliciting actual orders from the ultimate user perform in other businesses. A realistic legal and factual interpretation of P.L. 86-272 requires exemption of plaintiff from Oregon corporation income tax." (At 377, 378).

Similarly, the nature of Heublein's business as a distiller requires that it "deliver" in accordance with ABC regulations (here involving shipment from Connecticut with retention of bare legal title). But this technical delivery is the functional equivalent of that "shipment or delivery from a point outside the State" that the Federal Statute protects "in other, less technical businesses." To so hold is an eminently sensible solution to the problem of involuntary activities, and possesses the added virtue of providing to all interstate businesses the uniform protection of Public Law 86-272. The history and purpose of that Statute shows no intent to favor or disfavor any industry. The particular contours of state regulatory requirements are not relevant to the tax policy embodied in the Statute, especially where the regulation has effectuated no substantial change in the method of doing business.

Furthermore, this solution withdraws the incentive that any other solution gives to needless state regulation prompted by a desire for additional revenue.

The alternative is complete frustration of Congressional income tax policy. If each state legislature is left free to devise special requirements, whether they be registrations, appointment of agents, special modes of delivery—anything in fact which its own courts may interpret as beyond the protection of Public Law 86-272—the viability of the Statute is subjected to the whim of every state. The history of state taxation shows that States will quickly take advantage of the opportunities presented to them to augment their revenues.* And it is no answer to suppose that some or many of the States might refrain from exploiting the avenue to increased taxing jurisdiction thus opened up: Congress enacted Public Law 86-272 precisely because it was dissatisfied with leaving the choice to tax or not in the hands of each state.

B. The Twenty-first Amendment Does Not Sanction South Carolina's General Income Tax Levies.

The South Carolina Tax Commission may be expected to renew its argument in this Court that the imposition of South Carolina's general corporate income tax is authorized by the Twenty-first Amendment. This attempted justification is, however, wholly specious.

This is especially apparent from the form in which the argument has heretofore been presented.

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* Just as an example of how simple the technique can be, Florida requires, effective July 1, 1969, that all manufacturers or distributors of "spirituous liquors" qualify to do business in Florida before they ship spirituous liquors into the State. (F.S.A. §561.091). They are then automatically subjected to State tax on income, including income derived from interstate sales. (F.S.A. §220.03(1)(b); 1971 Laws ch. 71-984).

The South Carolina Tax Commission argued to the court below that "As Public Law 86-272 relates to the taxation of foreign corporations or businesses and is directly related to the Commerce Clause . . . it must yield to the State's power under the Twenty-first Amendment as does the Commerce Clause." [Brief of the South Carolina Tax Commission in the South Carolina Supreme Court, p. 7.]

This argument was essentially unchanged in the Motion to Dismiss filed in this Court [Motion to Dismiss, pp. 6-8].

The first flaw in the argument, surely fatal, is that the Twenty-first Amendment simply does not deal with state taxing power. The language and history of the Amendment may be sifted in vain for evidence that it was intended to preserve or extend the power of states to levy and collect income taxes. In addition to the repeal of the Eighteenth Amendment providing for national prohibition, the only substantive provision of the Twenty-first Amendment is contained in the second clause which reads as follows:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Amendment unquestionably confers upon the States power to regulate alcoholic beverages. It is equally unquestionable that South Carolina seeks, in this litigation, to vindicate only its interest in revenue. This case arises and turns upon a revenue assessment under South Carolina's general corporate income tax statute. The applicability and validity of South Carolina's regulatory legislation has not been drawn into question. No piece or pattern of regulation will be validated or invalidated by the outcome of this lawsuit. The conflict lies between state and national income tax policy, and to this conflict the Twenty-first Amendment is not germane.

The Supreme Court of Oklahoma faced a remarkably similar situation in *Oklahoma Tax Commission* v. *Brown Forman Distillers Corp.*, 420 P. 2d 894 (Okla. 1966). The distillers there involved conducted their business in Oklahoma very much as Heublein conducts its business in South Carolina. They were required by the Oklahoma Alcoholic Control Act [37 O.S. 1961 §501 *et seq.*] to "domesticate" in Oklahoma and appoint a service agent. The question presented was whether those distillers were protected by Public Law 86-272. The Supreme Court of Oklahoma held that they were. To the contention of the Oklahoma Tax Commission that the Twenty-first Amendment required a different result because alcoholic beverages were involved, the Court said:

> "The [Tax Commission's] reliance on the 21st Amendment is misplaced. No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." (*Id.* at 898)

Moreover, even if it could be maintained that the conflict involved regulation rather than taxation, the South Carolina Tax Commission's confidence that the Twenty-first Amendment overbears the Commerce Clause is misplaced. Its argument on this point, that "Public Law 86-272 relates directly to the commerce clause and therefore must yield to the state's power under the Twenty-first Amendment" [Motion to Dismiss, p. 8] is quite clear, and quite clearly wrong.

This Court has repeatedly rejected the general proposition that the Twenty-first Amendment has deprived Congress of all power to regulate traffic in alcoholic beverages. *Dept. of Rev.* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (upholding Congressional power under the Export-Import Clause); *Jameson & Co.* v. *Morganthau*, 307 U.S. 171, 173 (1939). This Court has unequivocally rejected

the specific proposition that the Twenty-first Amendment has deprived Congress of power over alcoholic beverages under the Commerce Clause:

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331 (1964).

The view that the Twenty-first Amendment left Congress with no power over alcoholic beverages is admittedly difficult to maintain even under the best of circumstances, for as was said in *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944) (upholding power of Congress to set maximum retail liquor prices):

> "Followed to its logical conclusion [the proposition that the Twenty-first Amendment had stripped the national government of all control over interstate commerce in alcoholic beverages], if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under authority of the National Labor Relations Act, 29 U.S.C.A. §151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under au-

thority of the Fair Labor Standards Act, 29 U.S.C.A. §201 et seq." (at 455).

The cases cited by the Tax Commission in support of its contentions are easily distinguished. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939) involved direct regulation of those engaged in transporting alcoholic liquors through the state. The case has nothing to do with income taxation, and its sweeping dictum concerning the scope of the Twenty-first Amendment can hardly be said to have survived *Hostetter* intact.

We do not have a situation here of a fixed licensing fee imposed in pursuit of a regulatory scheme such as the fee exacted in *Phillips* v. *City of Mobile*, 208 U.S. 472 (1908), and *State Board of Equalization* v. *Young's Market*, 299 U.S. 59 (1936), cited by Appellee. [Motion to Dismiss, p. 7]. The rationale advanced by the Court in *Phillips*, that "the higher the license . . . the better the regulation," (since it would tend to keep out undesirables and limit the number of those engaging in the business) (*Id.* at 479) has no application to a net income tax.

Cases such as *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939) involved direct regulation in the form of licensing importers or the prohibition of certain types of imports, or both.

But the validity of the South Carolina ABC Laws, which do regulate alcoholic beverage importation through registration and other requirements, are not here in issue. The question is whether a general corporate income tax such as South Carolina's, applicable to all industries, is a form of alcoholic beverage regulation which the Twenty-first Amendment specifically authorizes, to the extent that Congress is prohibited from applying its national income tax

policy to the alcoholic beverage industry. The argument which could reach this conclusion would also sweep aside all other Congressional regulations of interstate commerce as applied to alcoholic beverages, a *reductio ad absurdum* rejected in *Jatros* v. *Bowles, supra,* and by this Court in *Hostetter.*

Furthermore, the legislative history of the Amendment lends no support to this position.

The House and Senate debates which preceded Congressional submission of the Amendment demonstrate that Congress intended the second clause of the Amendment to protect the dry states through a retention of Federal power. As was said in an article read into the record by Senator Bingham, the clause was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the constitution the right of the dry states to have Federal protection against the importation of liquor".*

While the Amendment gave to dry states the additional protection of Federal power to enforce their prohibitory legislation, it did not otherwise prevent interstate commerce in liquor. In the words of Senator Glass:

> "In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors. . ."**

* 76 Cong. Rec. 4228 (1933). This was a widely held view. See remarks of Senator Blaine, *id.* at 4140-41; Senator Borah, *id.* at 4170-72; Mr. Gibson, *id.* at 4526.

** Remarks of Senator Glass, 76 Cong. Rec. 4219 (1933).

Nowhere does it appear that Congress intended to immunize alcoholic beverages from the effect of any and all national legislation.

CONCLUSION

The application of Public Law 86-272 to the income from Heublein's interstate shipments of alcoholic beverages in this case is clear and unequivocal. South Carolina may not avoid the Federal Statute by tests rejected by the Congress or by mandated local activities. Nor may the State use the Twenty-first Amendment to justify same. For these reasons, the decision below should be reversed.

Respectfully submitted,

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC., APPELLANT

v.

SOUTH CAROLINA TAX COMMISSION

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 29, 1972, inviting the Solicitor General to express the views of the United States.

1. Appellant, a Connecticut corporation engaged in the manufacture of alcoholic beverages in that State, seeks review and reversal of the judgment of the Supreme Court of South Carolina upholding the imposition upon it of an apportioned state income tax (and a license tax, liability for which depends upon liability for the income tax). Appellant does not question the apportionment formula employed, but asserts that South Carolina is without power to tax its income, invoking

the provisions of P.L. 86-272, 15 U.S.C. 381 (set forth at J.S. 30-32). That statute, in brief, provides that no State shall have power to impose a net income tax upon income derived from interstate commerce if the only business activities within such State by or on behalf of the taxable person are limited to the solicitation of orders sent outside the State for approval or rejection and, if approved, filled by shipment or delivery from a point outside the State. The statute was enacted in response to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, and to the suggestions contained in the opinion therein (p. 457) and in earlier opinions[1] that it lay within the power of Congress to determine when, and to what extent, interstate commerce, or income therefrom, should be subject to state taxation. S. Rep. No. 658, 86th Cong., 1st Sess., 2-3; H. Conf. Rep. No. 1103, 86th Cong., 1st Sess.

2. To appraise appellant's activities within South Carolina in terms of P.L. 86-272, it is necessary first to examine the regulatory setting within which they took place.

Pursuant to explicit authorization contained in Art. 8, Section 11 of the Constitution of South Carolina, the Alcoholic Beverage Control Act[2] of that State provides comprehensive and detailed regulation of liquor traffic. Enforcement and administrative control

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[1] See, *e.g., Northwest Airlines* v. *Minnesota,* 322 U.S. 292, 298, 303-304.

[2] Code of Laws of South Carolina (1962, as amended), Title 4, Chapter 1, Sections 4-1 through 4-150.

were, until 1967, vested in the South Carolina Tax Commission (§§ 4-5, 4-5.1, 4-6), and, since 1967, have been vested in the then created South Carolina Alcoholic Beverage Control Commission ("the Control Commission") (§§ 4-27—4-27.8). Manufacturers, wholesalers, and retailers must be separately licensed under statutory provisions relating to eligibility, location, number of licenses, and financial responsibility, with licenses limited in duration and subject to suspension or revocation (§§ 4-31—4-60). Maximum prices by retailers and wholesalers are established in terms of permissible mark-ups (§ 4-72). Terms and methods of sale by wholesalers (§§ 4-72.1—4-73.2), and by retailers (§§ 4-78—4-83) are established. Storage by wholesalers is controlled (§§ 4-74). Records of the movement of stocks of liquor are maintained by requirements that copies of invoices of liquors received (§ 4-75) and sold (§ 4-76) by wholesalers must be filed with the Control Commission within 24 hours after receipt or sale, supplemented by monthly statements of stocks on hand (§ 4-77).

Alcoholic beverages produced outside the State of South Carolina are specifically dealt with by Sections 4-131 through 4-150 of the Alcoholic Beverage Control Act, as amended (set forth at J.S. 32-40). No person other than a registered producer may ship or move alcoholic liquors from any point outside to a point inside South Carolina (§ 4-134). A producer may register with the Control Commission by filing prescribed forms (§ 4-136), must register brands to be shipped or moved into the State (§ 4-137), and may ship or move

into the State only brands so registered (§ 4-135). A registered producer must register a producer representative, who must be a resident of South Carolina (§ 4-131(3)) not having any direct or indirect interest in a wholesale or retail liquor business in South Carolina (§ 4-139).

Shipments of liquor into South Carolina may be made only to the registered producer in care of the producer representative (§ 4-141). Prior to shipment into the State, the producer must mail to the Control Commission a complete invoice showing in detail the items of the shipment by quantity, brand, price, etc., the point of origin and the point of destination of the shipment, and also, prior to or at the time of shipment, a copy of the bill of lading (§ 4-142). Immediately upon acceptance of delivery of the shipment, the producer's representative must furnish the Control Commission with a copy of the invoice showing the date, time, and place the delivery was accepted (§ 4-142). Such shipments, when received, must be stored in a licensed warehouse of the registered producer (§§ 4-140, 4-141), or, after delivery is complete, may be shipped to a duly licensed wholesaler (§ 4-141). Prior to shipment to a wholesaler, however, the producer's representative must seek, on prescribed forms, and obtain from the Control Commission, permission to make the shipment (§ 4-141). Prior to shipment to the wholesaler, the producer's representative must also mail the Control Commission a complete and detailed invoice covering the proposed shipment, showing the name and address of the consignee (§ 4-143). In addition to these controls, a registered producer has, since 1967, been

required to certify (subject to revocation of registration for violation) that it will not wilfully sell any alcoholic liquors of a particular brand and proof in any State of the United States at a price lower than the price to licensed South Carolina wholesalers (§ 4-137.1). Cf. *Seagram & Sons* v. *Hostetter*, 384 U.S. 35.

3. There appears to be no basis for questioning South Carolina's authority under the Twenty-first Amendment thus to control and localize the movement, distribution, and sale of alcoholic beverages, whether produced within or without the State. *State Board* v. *Young's Market Co.*, 299 U.S. 59. As this Court pointed out in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330:

> This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. * * *

And the Court added in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 346:

> There can surely be no doubt, either, of [a State's] plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. * * *

South Carolina's controls over liquor produced in other states are of a piece with the controls over liquor

produced within the State.[3] The maintenance of authorized channels for movement would be more difficult, and diversion facilitated, if out-of-state liquor could be shipped directly to local users or distributors. Cf. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131; *Gordon* v. *Texas*, 355 U.S. 369. The requirement that a resident representative, registered with the Control Commission, be appointed to receive shipments of liquor into the State, and to sell and deliver them only with the consent of the Commission, not only is integral to the system of controls but also makes the out-of-state producer and shipper more amenable to the authority of the State. Cf. *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202.

4. Appellant acknowledges (R. 9-10) that it has complied with the South Carolina Beverage Control Act by appointment of an employee as its registered representative resident in South Carolina, by shipping goods to him, and by his delivery of goods thus received in South Carolina to wholesalers in that State. In doing so, it has localized its business in the State, and has exceeded the minimal activities that are the predicate for the operation of P.L. 86-272. "The provisions of subsection (a) of Section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person

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[3] In liquor regulation, this non-discriminatory pattern is not constitutionally required. *State Board* v. *Young's Market Co.*, *supra*; *Indianapolis Brewing Co.* v. *Liquor Control Comm.*, 305 U.S. 391.

within the State." S. Rep. No. 658, 86th Cong., 1st Sess., 6-7.

The line drawn by the federal statute between direct shipment to the purchaser from an out-of-state stock of goods and delivery from goods held by the seller within the state is not a novel or an unfamiliar one. It parallels the decisions of this Court in "the long line of so-called 'drummer cases' " (*Nippert* v. *Richmond*, 327 U.S. 416, 417) where state or local licensing authority was in question. If delivery was made from goods held by the seller within the state, a license could be required. *Wagner* v. *City of Covington*, 251 U.S. 95; *Dalton Adding Machine Co.* v. *Virginia*, 246 U.S. 498. But if orders were solicited to be filled by direct shipment to the purchaser from an out-of-state stock of goods, then the demands of an open market for interstate commerce placed the activity beyond the licensing authority of state or local government. *Nippert* v. *Richmond, supra; Robbins* v. *Shelby County Taxing District*, 120 U.S. 489.

It may be true that appellant conducts its business in South Carolina in such a fashion as to localize it there only because the State, pursuant to its authority under the Twenty-first Amendment, so requires, if appellant chooses to do any business in the State. But, if so, that hardly furnishes reason to expand the application of P.L. 86-272 beyond its terms and the factual situations considered in its legislative history, and to apply it on a contrary-to-fact or might-have-been basis. Where there is federal authority, statutory or constitutional, for a state to control and localize a business that might otherwise assert the immunities appropriate to inter-

York and Oregon Bars entitled "Crystal Gazing: Legislative History in Action," 47 ABAJ 466 (May 1961), warns us at page 472:

> "Far better would it be for the courts to accord to legislature and executive the respect due to coordinate departments, to accept laws as passed according to their own words, the careful crystalization of study, preparation, drafting, debating, redrafting and final enactment.
>
> "A law is what it says, not the raw clay of which it was sculptured."

The Conference Report (No. 1103) on P.L. 86-272 states:

> "Both the House and Senate bills contain a minimum activities approach to the problem of State taxation of income from interstate commerce. It was the purpose of both Houses to specifically exempt, from State taxation, income derived from interstate commerce where the only business activity within the State by the out-of-State company was *solicitation.* * * *" (Emphasis added.)

"Solicitation" is the act of soliciting, or, as the dictionary states: "To endeavor to obtain by asking or pleading * * *" (Webster's New International Dictionary, Second Edition (Unabridged)). What is plead for? The statute clearly requires that the *orders* be solicited *and it is the orders which are thus solicited* which are sent outside of the state and which are filled by shipment or delivery from a point outside the state.

The use of the word "which" in the phrase "which orders are sent outside the state," etc., in the statute clearly ties in the orders solicited with the orders to be sent outside the state and filled outside the state. Where the solicitation is for orders to be filled from within the state, there is no exemption.

In order to circumvent the literal application of the language employed by Congress to the facts and circumstances of this case, the appellant contends that there is a substance to Public Law 86-272 which permits an ignoring of its express terms, not only in what constitutes "solicitation" but also in reference to what constitutes an "interstate" sale. Public Law 86-272 is addressed solely to interstate sales. The operative effect of the ABC law and of the appellant's activities in compliance therewith placed the sales in question in the category of intrastate sales as contrasted from interstate sales. Heublein's activities do not constitute mere "solicitation of orders".

Thus, appellant is contending, in the instant case, for (1) an extremely loose interpretation of Public Law 86-272, an interpretation which is contrary to the express terms of that statute; and (2) an equally loose application and interpretation of the facts. This approach is contrary to numerous decisions of this Court which require exemption statutes to be strictly construed and place upon the party claiming an exemption a distinct burden of proof. This requirement is particularly important where there is involved the interpretation and application of local law and the possible overruling of the findings and conclusions of a state supreme court.

C. Heublein's Activities in South Carolina Exceeded Permitted Activity Under Public Law 86-272.

As heretofore indicated, Heublein's representative in South Carolina engaged in extensive promotional activities for the purpose of consummating intrastate sales of alcoholic beverages on behalf of Heublein. In doing so, he was conforming with the requirements of the ABC law. As indicated by the Solicitor General in

his Amicus Curiae Memorandum, the terms of Public Law 86-272 do not include such promotional activities.

Additionally, Heublein's representative maintained an office in his home (Appendix 16). This Court, in *General Motors Corp. v. Washington, supra*, 377 U.S. 436, 12 L. Ed. 430, 84 S. Ct. 1564 (1964), commented that the use of a home as an office served the corporation "just as effectively" as other offices. The legislative history of Public Law 86-272 convincingly demonstrates that Congress did not intend to exempt a corporation maintaining an office in a state. The original bill would have permitted the maintenance of an office; this was deleted, and the clear intention of Congress remains to deny exemption if there is an office. See Beaman, "Paying Taxes to Other States" (1963), Chapter 6-15; Appendix B-6. This "home" office, together with the office maintained at the distributor's office (Ben Arnold Company) (Appendix 13) clearly takes Heublein outside the protection of Public Law 86-272.

Thus, Heublein's representative did not restrict his activities to solicitation of orders to be accepted out of state and filled "by shipment or delivery from a point outside the State". Rather, he did whatever was necessary for Heublein to establish, to maintain, and to hold the market for the retail, intrastate sale of its products in South Carolina.

In substance, Heublein argues that the activities of its representative in South Carolina did not exceed the activities which are exempt under Public Law 86-272 because these activities were required by the liquor regulatory measures of South Carolina. This is a *non sequitur*. It does not change either (1) the nature or extent of the appellant's activities within South Carolina or (2) the scope of the exemption and preference

granted by Public Law 86-272. We agree with the Solicitor General that the fact that the state of South Carolina has jurisdiction under the Twenty-First Amendment to require certain things to be done in South Carolina to carry on a liquor business furnishes no reason "to expand the application of P.L. 86-272 beyond its terms and the factual situations considered in its legislative history, and to apply it on a contrary-to-fact or might-have-been basis" (Br. of Solicitor General 7).

We also agree with the position of the Solicitor General that South Carolina's liquor control laws and the decision below do not threaten to render ineffective the protection afforded by Public Law 86-272 to other interstate businesses. It is absurd for appellant to contend that this Court's decision in favor of the state of South Carolina in this case would permit the extension of the applicability of the Twenty-First Amendment to businesses other than alcoholic beverage businesses.

Firstly, the promotional activities of Heublein's representative in South Carolina are in excess of activities required to meet the ABC law. Secondly, even if those activities did not exceed those requirements, the Twenty-First Amendment pertains to alcoholic beverage control and to alcoholic beverage control only. Thirdly, had Congress intended for Public Law 86-272 to immunize activities such as Heublein's from the tax jurisdiction of the state, Congress could easily have so provided by means of specific wording to that effect. It did not do so, even though the Twenty-First Amendment and the ABC law already were in effect. Finally, the business decision to comply with the requirements of the ABC law, prior to the enactment of Public Law 86-272, is no different than any other decision as to

how a business is to be conducted in a state, which decision carries with it its own tax consequences.

We do not agree with the inference in the appellant's brief that the South Carolina ABC law was designed to circumvent the otherwise applicable exemption provisions of Public Law 86-272. The ABC law was enacted prior to Public Law 86-272. It is therefore reasonable to assume that the State of South Carolina was concerned about control and management of the liquor traffic in South Carolina and was not concerned about income tax jurisdictional problems.

Nor do we find any merit in the appellant's contention that, were it not for the Alcoholic Beverage Control Act requirements of South Carolina, Heublein would do business in South Carolina in a manner as to be exempt under Public Law 86-272. This is pure conjecture on the part of appellant. It is not relevant to proceed in this case on the assumption that certain of appellant's activities in South Carolina were dictated solely by South Carolina liquor laws.

The enactment of the South Carolina ABC law in 1958 required Heublein to make a business decision. Heublein had to decide whether the South Carolina market was sufficiently profitable to justify Heublein's continuing to do business in that state. That decision was affirmative. It was affirmative despite the absence of Public Law 86-272. Heublein should not now be permitted, in the face of such facts, to speculate, to its own advantage, that Public Law 86-272, enacted in 1959, somehow has resulted in Heublein's continuing to abide by that 1958 business decision. The law and facts must be accepted as they are, and appellant should not be permitted to surmise as to the hypothetical effect of a change in either.

D. The Applicable Case Law Supports The Position Of South Carolina And The Solicitor General.

The scope of the exemption and of the immunity granted by Public Law 86-272 has been before the Supreme Court of Oregon on several occasions; and it has been considered by the Supreme Court of New Jersey in the recent case of *Clairol, Inc. v. Kingsley*, 109 N. J. Super. 22, 262 A.2d 213, aff. per curiam, 57 N. J. 199, 270 A.2d 702, appeal dismissed 402 U.S. 902 (1970). The most recent Oregon case is *Herff Jones Co. v. State Tax Commission*, 247 Or. 407, 430 P.2d 998 (1967), which limited the application of an earlier Oregon case, *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375 (1965). The principal question in the Oregon and New Jersey cases was what is to be included within the term "solicitation" as used in Public Law 86-272. The Supreme Court of Oregon, in the earlier *Smith Kline & French* case, *supra*, had given a broad interpretation to the word "solicitation". In substance, it overruled that interpretation in *Herff Jones Co., supra. Clairol*, in turn, followed the narrow interpretation of *Herff*.

Appellant here contends for a broad interpretation of the word "solicitation" and ignores the fact that that this case involves solicitation *and promotion* of *intrastate* sales, rather than of interstate sales.

Proper rules of statutory construction require a strict interpretation of the exemption granted by Public Law 86-272. The strict interpretation of the language by the Courts in *Clairol* and *Herff* is proper and supports the position of South Carolina in this cause. The Supreme Court of New Jersey noted in *Clairol* that

> "the primary function of Clairol's detailmen and other representatives in New Jersey is to pro-

mote the public's purchase and use of its products. To accomplish that purpose, its salaried cosmetics detailmen assigned to visit retail druggists do so at regular intervals."

This is the primary function of the appellant's representative in South Carolina. The New Jersey Supreme Court rejected the argument that such activity could be characterized as solicitation of orders for sales in interstate commerce.

Likewise, the Supreme Court of Oregon, in *Herff Jones Co. v. State Tax Commission, supra*, 247 Or. 407, 430 P.2d 998 (1967) declined to include in solicitation the collection of deposits and balances due on ordered merchandise. In holding that such in-state activity was not part of solicitation, The Oregon Supreme Court stated:

> "This court's decision in *Smith Kline & French v. Tax Com.*, supra, might be considered to have placed a broad interpretation on the word 'solicitation' as it is used in P.L. 86-272, and plaintiff's sales representatives' activities might well be considered no more than solicitation if such were the case. But, in *Cal-Roof Wholesale v. Tax Com.*, 242 Or. 435, 410 P.2d 233 (1966), this court expressly rejected such an interpretation. In that case we stated through Mr. Justice Schwab, p. 447:
>
> " 'In any event, the tax commission's analysis of our decision in *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375, as a "broad" interpretation "of solicitation" as the word is used in Public Law 86-272, is not warranted. Without mentioning the terms "inter" or "intra," Public Law 86-272 prohibits the imposition of a state tax on income.
>
> " ' " * * * if the *only business activities* * * * within such state * * * are * * * (1) the solicitation of orders by

such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)." ' (Italics supplied.)

"Therefore, it seems clear that in order to come within the purview of P.L. 86-272 the *only* business activity which plaintiff's sales representatives could engage in is the solicitation of orders. It is abundantly clear from the record that the representatives do more than this. Aside from the actual solicitation of orders, the salesmen also collect an initial deposit on merchandise ordered, and forward such deposits to plaintiff. The sales representatives on occasion also collect the balance due on the merchandise when it is delivered to a school. The sales representative may also do occasional collection work for plaintiff in order to prevent their own commissions from being reduced." (247 Or. 411-412)

If, as contended by appellant, Public Law 86-272 is not concerned with technicalities, we wonder with what it is concerned. It is not concerned with any comprehensive legislation concerning state and local taxation of interstate commerce. This is indicated by the history of Public Law 86-272.

Public Law 86-272 was hurriedly enacted by Congress after limited hearings before the Select Committee on Small Business of the United States Senate[3] and

[3]State Taxation on Interstate Commerce—1959, *Hearings before the Select Committee on Small Business, United States Senate,* Eighty-

the Committee on Finance of the United States Senate[3]

Public Law 86-272 not only defined the above referred to jurisdictional prerequisites, but also made provision for congressional study of the problem of state taxation of interstate commerce. This constitutional authorization has led to the creation of a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, which has conducted hearings on various aspects of the problems. The first series of hearings took place December 4 through 8, and December 11 through 13, inclusive, 1961.[4]

On June 15, 1964, this Special Subcommittee issued the first two volumes of its report.[5] Much of the material in these volumes indicate the continued existence of the problems involved in the state taxation of interstate commerce and note the artificial and limited scope of the provisions of P.L. 86-272.

Appellant, in its effort to bring itself within the immunity of Public Law 86-272, attributes entirely too much to this temporary legislation. To go beyond its language and to characterize the South Carolina decision as leading to "complete frustration of Congressional income tax policy" (App. Br. 26) is of little help when the arbitrary and temporary nature of the

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Sixth Congress, First Session, April 8, 1959, Part 1; May 1, 1959, Boston, Mass., Part 2; and June 19, 1959, Part 3.

[3]State Taxation of Interstate Commerce, *Hearings before the Committee on Finance, United States Senate*, Eighty-Sixth Congress, First Session, July 21 and 22, 1959.

[4]"State Income Taxation of Mercantile and Manufacturing Corporations", *Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives*, Eighty-Seventh Congress, First Session, December 4, 5, 6, 7, 8, 11, 12, and 13, 1961, Serial No. 20 (hereinafter referred to as the "Special Subcommittee").

[5]"State Taxation of Interstate Commerce", *Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives*, Pursuant to Public Law 86-272, as amended, Volumes 1 and 2.

legislation is considered. The temporary preference and immunity which it accords to certain interstate business under its specific terms in no way implies that it should be broadened to encompass "a business location" test (App. Br. 14) or to include activities which might be considered to be on a par with or even less significant than solicitation of interstate orders. We agree with the Solicitor General that Congress addressed this legislation to "drummer" sales activity (Solicitor General's Br. 7). In the instant case it is the wisdom of Congress and its role that must control. For the appellant to argue that Public Law 86-272 is not concerned with the technicalities of determining place of sale or passage of title and yet is concerned with the technicalities of where and how an order is accepted is totally inconsistent.

We note that for most of the period in question all sales were to one distributor, but that technical compliance with acceptance of the orders outside the state purportedly governed each and every sale, and a technical credit check was made on this one distributor as to each order (Appendix 26). It is no surprise that in no instance was any order rejected (Appendix 19, 27). In substance, appellant is claiming protection from the technicality of Public Law 86-272 and at the same time refuting such technicality in order to extend and reinterpret the law's requirements. It is technical legislation and should be so treated. There is no reason why the appellant's activities in South Carolina should be immune from the properly apportioned nondiscriminatory income tax law of South Carolina.*

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*As indicated in their brief amicus curiae filed on behalf of a number of states in *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. 2d 314 (1964) certiorari denied 379 U.S. 902 (1965), the states are well aware of the defects and limitations of Public Law 86-272. That brief asserted the unconstitutionality of Public Law 86-272 on the basis of several arguments including the contention that the criteria

E. Specific Additional Response To The Brief Of The Appellant.

The appellant's argument in this cause is circuitous and confusing. For this reason it is believed important to specifically analyze its nature and content.

By fragmenting and discussing separately its activities in the state of South Carolina, and by fragmenting and discussing separately the requirements of Public Law 86-272 in such a manner as to conclude that Heublein is entitled to an exemption, appellant would lead this Court to believe that its activities are protected by Public Law 86-272. As a further fragmentation of its factual picture, appellant would have subtracted, from its total activity in South Carolina activity it attributes to the ABC law. This fragmented approach to the facts and the requirements of Public Law 86-272 is not justified. The *total* of the appellant's activities in South Carolina must be applied against the *total* requirements of Public Law 86-272.

Appellant further argues that the purpose of Public Law 86-272 was to "protect a businessman who shipped from a stock of goods maintained outside of the state, leaving unprotected those who maintain their stocks in the state." (App. Br. 14.) As a matter of fact, the statute employs no such test. In order to be protected by the statute, the activity must be subject to characterization as "the solicitation of orders" by any person from interstate commerce.

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employed to separate immune from taxable activity were highly artificial and had previously been rejected by this Court in deciding interstate commerce state tax questions.

No constitutional question has been raised in the instant Heublein case. Inasmuch as Public Law 86-272 has no application here, we believe the constitutional question cannot properly be reached. Futhermore, there is some indication by this Court's denial of certiorari in the *International Shoe* case, *supra*, and its dismissal of appeal in *Clairol*, *supra*, that this Court might be inclined to uphold the constitutionality of Public Law 86-272 if the question of constitutionality were properly raised.

In arguing, on pages 9-23 of its brief under the heading "Heublein's Activities in South Carolina Do Not Remove It From The Protection Of Public Law 86-272", appellant classifies its activities as the solicitation of orders in South Carolina (App. Br. 10). Yet, on page 6 of its brief, appellant claims that the producer-representative did not take any orders. Obviously, if he did not take any orders his activities could not be that of the solicitation of orders.

The quotation on pages 11 and 12 of the appellant's brief from the dissent in *Northwestern Cement Co. v. Minn.*, 358 U.S. 450, is irrelevant. The history of congressional involvement in the field of state and local taxation since the enactment of Public Law 86-272, referred to by appellant on pages 12-14 of its brief is likewise of no import here. These references are smoke screens used by appellant to cloud the effect of the language employed by Congress in the enactment of Public Law 86-272 and to confuse this Court as to the manner in which that language should be applied to the uncontroverted facts in this cause. Such references are made apparently with the object of establishing that Congress has employed a "business location" rather than a "business activity" test in Public Law 86-272. This contention is not supportable by the history of Public Law 86-272 which shows that Congress specifically rejected this latter test.

In making the "business location" argument, Heublein relies on the phrase "shipment * * * from a point outside the State" and assumes that any shipment across state lines, even though the title and risk are retained by the seller until after the property is located within the state, is an interstate sale which is protected by Public Law 86-272. As a matter of fact, the sales were intrastate and all the legal consequences

that flow from this fact exist as to these sales. The shipments from out-of-state were made to Heublein's representative in South Carolina. Subsequently, after the goods reached South Carolina and while they were still owned and possessed by Heublein through its representative, that representative transferred them within South Carolina to Heublein's customers. These are intrastate sales and not interstate sales. The shipment with which Public Law 86-272 is concerned is the transfer from an out-of-state seller to an in-state buyer in "interstate commerce" and not a shipment which is "intrastate" in nature. Thus, it is irrelevant for the purpose of characterizing Heublein's in-state activities that its alcoholic beverages were delivered to the wholesaler's place of business in South Carolina rather than to Heublein's own warehouse prior to the transfer of title and sale in South Carolina. The absence of a South Carolina warehouse does not change the intrastate nature of the sales transactions.

The statement on page 17 of the appellant's brief that "* * * The plain language of the statute demonstrates that Public Law 86-272 is concerned with the physical location of goods when ordered and shipped in interstate commerce, and not with the technicalities of determining place of sale or passage of "title." is without foundation. The delivery was made to Heublein's customers from a stock of goods located in the state. This is the operative effect of the ABC law, and the technical requirements of delivery and passage of title with which the appellant complied.

Recognizing that as a matter of technical law we are here concerned with in-state sales and deliveries, the appellant next argues that the in-state transfer of title and delivery is only a "documentary formality" and should give way to "substantive requirements."

Appellant argues that the requirements of the ABC law is a mere formality and did not change its pattern of activity within the state of South Carolina. This argument leaves as a useless appendage to its brief its argument on pages 23-32 that South Carolina's regulatory laws and the requirements of the Twenty-First Amendment can and should be completely ignored in determining either the operative effect of Public Law 86-272 or the controlling facts in this cause.

Appellant contends that, although the ABC law requires physical delivery to Heublein's representative in South Carolina and then redelivery from him to the wholesaler, actual practice allows Heublein to treat such delivery as only a paper transaction. Appellant then derides the paper transaction as a mere technicality which does not destroy Heublein's immunity under Public Law 86-272. In so doing, appellant ignores the fact that the ABC law, however lightly obeyed in practice accomplishes its purposes of controlling the importation of liquor into the state of South Carolina. A taxpayer's success in using shortcuts to comply with the law should not be accepted as a basis for ignoring the purpose and effect of that law or the legal significance of the steps required to be taken. Heublein may use the shortcut method as a shield against any charge that it failed to comply with the ABC law of South Carolina; but it cannot use that practice as a sword to attack the true legal consequences of compliance with the ABC law.

Heublein is present in South Carolina in the form of its representative there. Through him Heublein owned and possessed, even if only momentarily, every ounce of alcoholic beverages which was purchased from Heublein by anyone in the state of South Carolina

during the years in question. That ownership and possession plus subsequent transfer to the wholesaler subjected Heublein to the corporate income tax jurisdiction of South Carolina. Here, compliance with the legal requirements constitutes more than mere form; it constitutes the substance of what appellant in fact does in South Carolina.

We concur with the appellant's assertion on page 27 of its brief "* * * that the Twenty-First Amendment simply does not deal with state taxing power. * * *" This is not a Twenty-First Amendment problem, and the effect of the Twenty-First Amendment should be given no consideration by this Court. This does not mean, however, that the activities that are required of the appellant in the state of South Carolina as a result of state legislation concerning the Twenty-First Amendment are irrelevant or immaterial.

III.

SUMMARY AND CONCLUSION

As indicated herein, it is the position of the Multistate Tax Commission that Public Law 86-272 is a technical statute dealing with an income tax exemption for multistate businesses conducting a limited activity within a state. A statute of this nature should be strictly construed against the person claiming exemption and immunity from state and local income tax laws and should be strictly construed in favor of the jurisdiction of the states to impose a nondiscriminatory properly apportioned net income tax on a multistate business, such as Heublein. Furthermore, there should not be carved out of otherwise taxable activity, activity which Heublein would attribute to

the compliance with the Alcoholic Beverage Control Act of South Carolina.

Application of these basic principles clearly establish that Heublein's activities in South Carolina subject it to the income tax jurisdiction of South Carolina and are without the protective umbrella of Public Law 86-272. Heublein did in fact carry on activity in the state of South Carolina that could not be characterized as the solicitation of orders for sales from interstate commerce. No interstate sales were solicited by Heublein's representative in South Carolina. Heublein's activities in South Carolina were of an institutional nature designed to establish and maintain its position in the alcoholic beverage market in South Carolina. The reasons why Heublein has chosen to carry on activities which create tax liability are wholly irrelevant. The fact is Heublein does do business in South Carolina; and that tax liability results.

It is therefore requested that the decision of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

On Appeal from the Supreme Court of South Carolina

REPLY BRIEF FOR THE APPELLANT

ARGUMENT

Heublein's compliance with South Carolina's Alcoholic Beverage Control Laws does not deprive it of the protection of Public Law 86-272.

Heublein agrees with the South Carolina Tax Commission that the fundamental question presented on this appeal is whether Heublein's business activities in South Carolina take it out of the protection of Public Law 86-272. This issue, however, comes before this Court considerably narrowed by the decision of the South Carolina Supreme Court.

The trial court found that Heublein's solicitation and promotional activities did not take it out of the protection of the Federal Statute [App. 33]; the Supreme Court of South Carolina left this finding undisturbed, basing its determination that Heublein was not covered by the Federal Statute on the sole ground that compliance with the ABC laws rendered its sales "intrastate" and "beyond the reach of Public Law 86-272". [App. 37]. Consequently, the only question presented to this Court is whether such compliance of itself renders Public Law 86-272 inapplicable. The nature and extent of Heublein's promotional and solicitation activities, activities which are not mandated by the state ABC laws, do not bear on this question and are not before this Court.

On the facts presented by this case, it is apparent that South Carolina's ABC laws do not require of Heublein any activities which the Federal Statute by its terms does not protect. These requirements amount to the registration of Heublein, its brands and its local agent; and having the local agent accept delivery and endorse shipping documents over to the wholesaler in South Carolina to whom the goods have been shipped. [App. 10, 18-19]. The formality of endorsement of shipping papers, constituting at most transfer of legal title within the state, is not the type of business activity which takes Heublein out of the Statute. As the legislative history makes clear, Congress sought to avoid the use of just such formalities in determining state taxing power.* It is inconceivable that Congress, dissatisfied with the results of a point-of-sale test

* S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959); Brief for the Appellant, pp. 18-21.

of state taxing jurisdiction, intended to focus instead on the place where title passed.

Similarly, it is not relevant that delivery for purposes of the state ABC laws is deemed to occur in South Carolina; adherence to that test would again destroy the uniform application of the Federal Statute in each state. In the plain, ordinary meaning of the terms, orders received by Heublein from its wholesaler in South Carolina "are filled by shipment or delivery from a point outside the state"; that the admitted factual pattern also satisfies the ABC law requirement of delivery within South Carolina is irrelevant. It certainly makes no sense at all to argue, as has been done,* that South Carolina regulatory laws should be more effective in extending state taxing jurisdiction than in regulating alcoholic beverages.

A major fallacy in the reasoning of the South Carolina Supreme Court and the South Carolina Tax Commission lies in supposing that characterizations of Heublein's activities for the purposes of state ABC laws determine the applicability of the Federal Statute. Congress, on the contrary, plainly intended to establish an independent test. This independent test looks to the commercial reality of the order and shipment, in this case goods ordered from a Connecticut producer and shipped to a South Carolina wholesaler directly from an out-of-state stock of goods, despite the in-state checkpoint mandated by the state ABC laws. Because, on the facts presented, Heublein satisfies that independent test, the decision below should be reversed. More importantly, the decision below should be reversed because the South Carolina Supreme Court, as a matter of law, improperly linked the applicability of

* Memorandum for the Multistate Tax Commission as *Amicus Curiae*, p. 21.

Public Law 86-272 to characterizations of Heublein's activities derived from state law when it should have looked instead to the independent standards contained in the Federal legislation.

The unchecked application of this method of construction will have very serious consequences for Public Law 86-272, consequences by no means limited to the alcoholic beverage industry. It should be quite clear, for example, that insofar as the result reached below depends, by means of the application of South Carolina's ABC laws, upon the place where title to the goods passed or delivery occurred, the effect on Public Law 86-272 is as wide-ranging and deleterious as a return to the rejected point of sale test, *i.e.*, Public Law 86-272 is, for all practical purposes and for any article of commerce, nullified. This is so because it was the dependence of taxing jurisdiction on state determination of the place of sale that called forth Public Law 86-272, and reversion to tests dependent upon each state's determination of the point at which title passes (or delivery occurs) under local law leads to exactly the same situation which existed before Public Law 86-272.

This broad-based attack on Public Law 86-272 does not at all depend upon the nature of the goods being shipped or delivered; if it continues unchecked the effectiveness of Public Law 86-272 for all interstate commerce will be severely diminished. In the instant case, however, there is the additional element of alcoholic beverage regulation. In this case, South Carolina's ABC laws constitute the particular local law which the South Carolina Supreme Court has applied to determine that title has passed (or delivery taken place) in South Carolina with the conse-

quence, in that court's view, that South Carolina may levy its corporate income tax on Heublein. But the absence of the particular vehicle of the ABC laws in instances not involving alcoholic beverages in no way diminishes the impact of an interpretative technique which neglects the independent standards contained in the Federal Statute and persists in looking to state law. Whether local law requires that title pass within the state as a regulatory measure, or simply deem that it has so passed as a matter of local commercial law characterization makes no perceptible difference. South Carolina is in either case free, under the reasoning of the decision of its Supreme Court, to determine that full legal title to goods shipped into South Carolina passes only upon arrival in South Carolina and, as a consequence, any sales of these goods in South Carolina are "intrastate transactions and beyond the reach of Public Law 86-272."

To the argument that the Commerce Clause protects interstate commerce from this type of burden it should suffice to point out that Congress did not agree when it enacted Public Law 86-272; and, in any event, to throw interstate commerce back upon the protection of the Commerce Clause is an admission that Public Law 86-272 has been rendered totally ineffective.

The position of the South Carolina Tax Commission is only plausible if taxation is confused with regulation. The plain fact is that the South Carolina Supreme Court's failure to address itself to the Federal Statute's independent and uniform standard of protected business activity, and its resort instead to technical state law concepts of title and delivery, threatens to undermine the Federal

Statute. The notion, implicit in the Tax Commission's position, that submission to South Carolina's general corporate income tax is somehow just another regulatory burden which alcoholic beverages, by virtue of their special status under the Twenty-First Amendment, must bear and which will be limited to them is wrong and ought to be rejected. Heublein is not being regulated, it is being taxed, and the technique South Carolina has used to avoid the protective umbrella of Public Law 86-272 here can be used anywhere.

A further point must be mentioned. Alcoholic beverages are not the only articles of commerce subject to state regulation. States generally have the power to protect the health and welfare of their citizens by suitable means, and counted among the areas subject to this type of regulation would be, for example, food, prescription drugs, dangerous articles and transactions in securities typically made the subject of state Blue-Sky laws. Although, as discussed above, the reintroduction of disuniformity into state income taxation of interstate commerce need not depend upon state regulatory provisions, it is clear that use of such provisions is by no means limited to the alcoholic beverage industry and upholding their use by South Carolina to extend its taxing jurisdiction will have consequences for industries completely unconcerned with alcohol.

Where a state bases its taxing jurisdiction on compliance with its own regulatory legislation, the additional question should be asked whether this compliance results in the equivalent of shipment and delivery from outside

the state for purposes of Public Law 86-272. This does not create an exception to Public Law 86-272, but instead is an attempt to apply the Statute in accordance with its purpose, which is to achieve uniformity in taxation rather than confer upon some national industries an advantage not enjoyed by others. Where a state has, through regulation, chosen to admit certain goods into its markets only through specific channels, delivery through these channels is nonetheless, as the trial court found, "shipment or delivery" from out of state within the meaning of Public Law 86-272. [App. 34]. See *Smith, Kline & French Laboratories* v. *State Tax Comm'n,* 241 Or. 50, 430 P. 2d 375 (1965).

Congress chose not to extend the protection of Public Law 86-272 to persons whose business activities went further in exploiting the state market than the solicitation of orders specified in the Statute. Delivery of goods already ordered into South Carolina does not constitute such a further exploitation of the market: whatever additional steps Heublein takes to deliver in compliance with South Carolina's ABC laws is not a business activity designed to augment its presence within the state or enhance its marketing posture*; Heublein would have to take these same steps to deliver goods to a resident of South Carolina in response to a completely unsolicited order. Reasonable regulation will typically not require activities which expand the market of out of state firms but will instead, as here, simply channel the flow of goods in such manner as the state chooses. Delivery through these channels must be protected if the Federal Statute is to serve its purpose.

* Heublein did not perform any of these mandated activities before South Carolina enacted its ABC legislation [App. 31].

Conclusion

For the foregoing reasons, together with those contained in the Brief for the Appellant, the decision below should be reversed.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HEUBLEIN, INC. *v.* SOUTH CAROLINA TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71–879. Argued November 13, 1972—
Decided December 18, 1972

Incident to South Carolina's valid scheme of regulating the sale of liquor within the State, a requirement that a manufacturer do more, as a condition of doing business, than merely solicit sales is not impermissible even though it has the effect of requiring the out-of-State manufacturer to undertake activities that eliminate its protection under 15 U. S. C. § 381 from the state income tax. Pp. 3–9.

257 S. C. 17, 183 S. E. 2d 710, affirmed.

MR. JUSTICE MARSHALL delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a statement concurring in the result. STEWART, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 71–879

Heublein, Inc., Appellant,
v.
South Carolina Tax Commission.

On Appeal from the Supreme Court of South Carolina.

[December 18, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must determine whether South Carolina may tax the income from local sales of Heublein's products, consistent with the limitations on the State's power to tax imposed by 15 U. S. C. § 381 (1970).[1] The South Carolina Tax Commission assessed Heublein, Inc., a Connecticut corporation which produces alcoholic beverages, a total of $21,549.50 in taxes on income de-

[1] 15 U. S. C. § 381 (1970) provides in pertinent part:

"No State . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person . . . are either, or both, of the following:

"(1) the solicitation of orders by such person, or his representative, in such State, for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

rived from the sale of its goods in South Carolina.[2] After a hearing before the Tax Commission, Heublein paid the taxes and brought suit to recover them. The Court of Common Pleas held that § 381 protected Heublein from tax liability in South Carolina. The Supreme Court of South Carolina reversed. 257 S. C. 17, 183 S. E. 2d 710. We noted probable jurisdiction, 405 U. S. 952 (1972), and now affirm. We hold that Heublein's activities within South Carolina exceed the minimum standards established in 15 U. S. C. § 381, and that South Carolina may, pursuant to an otherwise valid regulatory scheme, compel Heublein to undertake activities which take it beyond the protection of 15 U. S. C. § 381.

I

During the years in question, Heublein had one employee in South Carolina. He maintained an office in his home and a desk at the warehouse of Ben Arnold Company, the local distributor of Heublein's products. Heublein's representative briefed Ben Arnold's salesmen on Heublein's products, and travelled throughout the State to liquor retailers, telling them of the products and leaving promotional literature with them. Ordinarily, the retailers sent orders directly to Ben Arnold, but occasionally Heublein's representative transmitted them. Ben Arnold, in turn, placed its orders with Heublein's home office in Connecticut. Heublein then acknowledged its acceptance of the order and indicated to Ben Arnold when the goods would be shipped. They were sent by common carrier consigned to Heublein in care of its representative at the premises of Ben Arnold.

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[2] A license tax, which is predicated upon liability for income taxes, was also assessed and paid. South Carolina Code § 65-606 (1962). There is no dispute over the amount for which Heublein is liable under these statutes.

This arrangement, which served none of Heublein's business interests, was adopted to conform to the requirements of the South Carolina Alcoholic Beverages Act. South Carolina Code §§ 4–1 ff. (1962, as amended). Under that Act, only registered producers of registered brands of alcoholic beverages may ship those brands of alcoholic beverages into the State. §§ 4–134, 4–135. Such producers must have a resident representative who has no direct or indirect interest in a local liquor business. §§ 4–131 (3), 4–139. Shipments of liquor into the State may be made only to the producer in care of its representative. § 4–141. Prior to the shipment, the producer must mail a copy of the invoice showing the quantity and price of the items shipped, and a copy of the bill of lading, to the Alcoholic Beverage Control Commission. Immediately after accepting delivery, the representative must furnish the Commission a copy of the invoice showing the time and place of delivery. *Ibid.* When received, the shipment must be stored in a licensed warehouse of the producer, or, after delivery is complete, the shipment may be transferred to a licensed wholesaler. §§ 4–140, 4–141. Before the goods are shipped to a wholesaler, however, the representative must obtain the Commission's permission to make the transfer. § 4–141. Heublein complied with this regulatory scheme.

II

15 U. S. C. § 381 (1970), on which Heublein relies, provides that no State shall have power to impose a net income tax on income derived within the State from interstate commerce if the recipient of the income confined its business within the State to "the solicitation of orders . . . in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State."

We need not decide whether, as the State urges, the actions of Heublein's representative in maintaining a local office, meeting with retailers, distributing promotional literature, and personally delivering some orders to the wholesaler, do not fall within the term "solicitation." Compare *Smith Kline & French* v. *Tax Commission*, 241 Ore. 50, 403 P. 2d 375 (1965), with *Clairol, Inc.* v. *Kingsley*, 109 N. J. Super. 22, 262 A. 2d 213, aff'd 57 N. J. 199, 270 A. 2d 702 (1970), appeal dismissed 402 U. S. 902 (1971). For here Heublein has done more than just those acts. It sent its products to its local representative who transferred them to a local wholesaler. This transfer occurred within the State and clearly was neither "solicitation" nor the filling of orders "by shipment or delivery from a point outside the State" within the meaning of § 381.

Heublein contends, however, that the transfer never would have occurred had not South Carolina required it as a condition of conducting business within the State. Heublein argues that a State may not evade the purpose of § 381 by requiring a firm to do more than solicit business within the State and then taxing the firm for engaging in this compelled additional activity.

If we were persuaded that South Carolina has evaded the intent of the statute, we would of course be reluctant to uphold its actions. But that is not what South Carolina has done here. The legislative history of § 381 shows that Congress had rather limited purposes which are not evaded by South Carolina's regulation of liquor sales in the manner it has chosen. Congress did not focus on the consequences of its actions for such local regulatory schemes. We therefore will not read the statute as prohibiting the States from adopting such schemes, even when the regulation requires the producer to have more than the minimum contacts with the State for which § 381 provides tax immunity. Such

a reading would require us to assume that Congress carefully considered the difficult problems of accommodating the federal interest in an open national economy with local interest in regulating the sale of liquor. The evidence is clear that Congress did not do so.

The impetus behind the enactment of § 381 was this Court's opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959). There we held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." 358 U. S., at 452. Congress promptly responded to the "considerable concern and uncertainty" [3] and the "serious apprehension in the commercial community" [4] generated by this decision by enacting Pub. L. No. 86–272, 73 Stat. 555, 15 U. S. C. § 381, within seven months.

In this statute, Congress attempted to allay the apprehension of businessmen that "mere solicitation" would subject them to state taxation. Such apprehension arose because, as businessmen who sought relief from Congress viewed the situation, *Northwestern States Portland Cement* did not adequately specify what local activities were enough to create a "sufficient nexus" for the exercise of the State's power to tax.[5] Section 381 was designed to define clearly a lower limit for the exercise of that power. Clarity which would remove uncertainty was

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[3] S. Rep. No. 658, 86th Cong., 1st Sess., 2.

[4] H. R. Rep. No. 936, 86th Cong., 1st Sess., 1.

[5] See, *e. g.*, S. Rep. No. 658, *supra*, n. 3, at 2–3: "persons engaging in interstate commerce are in doubt as to the amount of local activities within a State that will be regarded as forming a sufficient 'nexus,' that is, connection, with the State to support the imposition of a tax on net income from interstate operations and 'properly apportioned' to the State."

Congress' primary goal. By establishing such a limit, Congress did of course implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy. But it did not address the questions raised by a requirement, incident to a valid regulatory scheme, that a business undertake activities above the limit as a condition of doing business within the State.[6]

Congress recognized, instead, that the accommodation of local and national interests in this area was a delicate matter. The committees reporting the bill to the House and Senate emphasized the difficulty of devising appropriate limitations on state taxing powers. Both Committees called their bills temporary solutions to meet only the most pressing problems created by *Northwestern States Portland Cement.*[7] More comprehensive

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[6] That Congress was untroubled by those questions is suggested by its emphasis on the increased overhead and record-keeping which local taxation of minimal activities would cause. See, *e. g.*, S. Rep. No. 658, *supra*, n. 3, at 4; H. R. Rep. No. 936, *supra*, n. 4, at 2: "These businesses are concerned not only with the costs of taxation, but also with the inescapable fact that compliance with the diverse tax laws of every jurisdiction in which income is produced will require the maintenance of records for each jurisdiction and the retention of legal counsel and accountants who are familiar with the tax practice of each jurisdiction." Where a valid regulatory scheme requires that records be kept, the overhead costs about which Congress was concerned might not rise substantially when a state income tax was imposed. South Carolina's scheme for regulating liquor does little more than require that Heublein keep certain records.

[7] H. R. Rep. No. 936, *supra*, n. 4, at 2; S. Rep. No. 658, *supra*, n. 3, at 4–5: "Your committee recognizes that the bill it has reported is not a permanent solution to the problem that exists. It was not intended to be. Your committee . . . recognizes that the problem is a complex one which requires extensive and exhaustive study in arriving at a permanent solution fair alike to the States and to the Nation. Your committee believes, however, that the bill it has reported will serve as an effective stopgap or temporary solution while further studies are made of the problem."

legislation could only follow careful study, in the Committees' view. Congress agreed, and in Title II of Pub. L. No. 86–272, provided that the Committee on the Judiciary of the House of Representatives and the Committee on Finance of the Senate study the entire problem of state taxation of interstate commerce.[8]

Congress, then, did not address in § 381 the problem of taxing a business when it undertook local activities simply in order to comply with the requirements of a valid regulatory scheme. Such regulation is an important function of local governments in our federal scheme. As we said last Term, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U. S. 336, 349 (1971).

Congress of course did not enact in § 381 a statute which a State can deliberately evade by requiring a firm to undertake more than mere solicitation. When a State enacts a regulatory scheme which serves legitimate State purposes other than assuring that the State may tax the firm's income, it is not evading § 381; it is pursuing permissible ends in a manner which Congress did not address. Thus, if South Carolina's system of regulating the sale of liquor is valid, § 381 does not prohibit taxation of Heublein's local sales.[9]

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[8] This report is published as H. R. Rep. No. 1480, 88th Cong., 2d Sess., H. R. Rep. No. 565, 89th Cong., 1st Sess., and H. R. Rep. No. 952, 89th Cong., 1st Sess.

[9] MR. JUSTICE BLACKMUN, in his separate statement, suggests that § 381 does proscribe what South Carolina has done here, but that the Twenty-first Amendment prohibits such an action by Congress. In his view, to the extent that § 381 prohibits taxing activities undertaken in order to comply with a regulation valid under the Twenty-first Amendment, it is unconstitutional. We prefer to read the statute and its legislative history, ambiguous though they may be, to avoid such a holding. Cf. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). And, though the relation between the Twenty-

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South Carolina's Alcoholic Beverage Control Act is a long and detailed statute. Requirements that certain records be kept by the manufacturer, the wholesaler, and the retailer pervade the scheme. There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, South Carolina establishes a check on the accuracy of these records. For example, when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in South Carolina be no higher than that elsewhere in the country. South Carolina Code § 4–137.1 (1962, as amended). The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes and is not simply an attempt by the State to provide a basis for the taxation of an out-of-state seller's local sales.

Nor does this requirement violate the Commerce Clause. The Twenty-first Amendment, § 2, provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court said in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964):

> "This Court made clear in the early years following the adoption of the Twenty-First Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations

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first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause. Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

> when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."

The requirement that, before engaging in the liquor business in South Carolina, a manufacturer do more than merely solicit sales there, is an appropriate element in the State's system of regulating the sale of liquor.[10] The regulation in question here is therefore valid, and § 381 does not apply. The judgment of the Supreme Court of South Carolina is

Affirmed.

MR. JUSTICE BLACKMUN, being of the opinion that the Twenty-first Amendment provides the sole authority for what South Carolina has required of Heublein by its Alcoholic Beverage Control Act and, to that extent, overrides what otherwise would be proscribed by 15 U. S. C. § 381, concurs in the result and in the judgment of the Court.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

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[10] In upholding a comprehensive scheme of liquor regulation rather similar to South Carolina's, this Court said:

"[The State] has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonble and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well-known evils . . . ." *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 139 (1939). Cf. *Duckworth* v. *Arkansas,* 314 U. S. 390 (1941); *Carter* v. *Virginia,* 321 U. S. 131 (1944).